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No.

In the Supreme Court of the United States

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Child Online Protection Act violates the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner is Michael B. Mukasey, Attorney General of the United States. Respondents are American Civil Liberties Union, Androgyny Books, Inc. d/b/a A Different Light BookStores, American Booksellers Foundation for Free Expression, Artnet Worldwide Corporation, Blackstripe, Addazi Inc. d/b/a Condomania, Electronic Frontier Foundation, Electronic Privacy Information Center, Free Speech Media, OBGYN.net, Philadelphia Gay News, PlanetOut Corporation, Powell's Bookstore, Riotgrrl, Salon Media Group, Inc. (f/k/a Salon Internet Inc.), and ImageState North America, Inc. (f/k/a West Stock, Inc.). The Internet Content Coalition was formerly a party but no longer exists.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-52a) is reported at 534 F.3d 181. An earlier opinion of the court of appeals (App. 150a-212a) is reported at 322 F.3d 240, and another earlier opinion is reported at 217 F.2d 162. The opinion of the district court (App. 55a-149a) is reported at 478 F. Supp. 2d 775. An earlier opinion of the district court is reported at 31 F. Supp. 2d 473.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2008. A petition for rehearing was denied on September 16, 2008 (App. 53a-54a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law * * * abridging the freedom of speech, or of the press." The pertinent statutory provisions are reprinted in an appendix to this petition. App. 213a-220a.

STATEMENT

1. a. This case involves the scope of Congress's power to protect minors from the harmful effects of sexually explicit material on the Internet. Congress first sought to address that serious problem through the enactment of Section 502 of the Communications Decency Act of 1996 (CDA), Pub. L. No. 104-104, Tit. V, 110 Stat. 133. The CDA prohibited the knowing transmission of "indecent" messages over the Internet to persons under the age of 18, 47 U.S.C. 223(a)(1)(B) (2000), as well as the display of "patently offensive" sexually explicit messages in a manner available to those under 18 years of age, 47 U.S.C. 223(d) (2000). The CDA provided a defense to prosecution to persons who had taken steps to restrict access by minors to covered communications. 47 U.S.C. 223(e)(5).

In *Reno* v. *ACLU*, 521 U.S. 844 (1997), the Court held that the CDA's regulation of "indecent" and "patently offensive" speech violated the First Amendment. The Court reaffirmed that the government has a "'compel-

ling interest in protecting the physical and psychological well-being of minors' which extend[s] to shielding them from indecent messages that are not obscene by adult standards." *Id.* at 869 (quoting *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 126 (1989)); see *id.* at 875. It concluded, however, that the government had failed to demonstrate that the CDA was the least restrictive alternative available to further that compelling interest. *Id.* at 874-879.

b. Congress responded to this Court's decision by reexamining the problem of children's access to sexually explicit material on the Internet. See *Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing Before the Subcomm. on Telecomms., Trade & Consumer Prot. of the House Comm. on Commerce*, 105th Cong., 2d Sess. (1998); see S. Rep. No. 225, 105th Cong., 2d Sess. 8 (1998). Following legislative hearings, *ibid.*, Congress enacted, and the President signed into law, the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, 112 Stat. 2681-736 (47 U.S.C. 231 & note).

COPA authorizes the imposition of criminal and civil penalties on any person who "knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors." 47 U.S.C. 231(a)(1). A person communicates "for commercial purposes" only if he "is engaged in the business of making such communications," 47 U.S.C. 231(e)(2)(A), and a person is engaged in the business of making such communications only if he "devotes time, attention, or labor" to making harmful-to-minors communications "as a regular course of

[his] trade or business, with the objective of earning a profit as a result of such activities." 47 U.S.C. 231(e)(2)(B).

COPA defines "material that is harmful to minors" as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind" that is "obscene" or that

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6).

COPA's definition of non-obscene material that is "harmful to minors" parallels the three-part "harmful to minors" standard this Court approved in *Ginsberg* v. *New York*, 390 U.S. 629 (1968), except that it has been modified to take into account the greater flexibility permitted by *Miller* v. *California*, 413 U.S. 15 (1973). Compare 47 U.S.C. 231(e)(6), with *Ginsberg*, 390 U.S. at 632-633, and *Miller*, 413 U.S. at 24; see H.R. Rep. No. 775, 105th Cong., 2d Sess. 13, 27-28 (1998). COPA's definition also tracks the standard used in state laws that prohibit the public display of magazines or other materials that are harmful to minors and that require that such

materials be placed behind a blinder rack, in a sealed wrapper, or in an opaque cover. *Id.* at 13.

COPA provides "an affirmative defense to prosecution" if a person, "in good faith, has restricted access by minors to material that is harmful to minors." 47 U.S.C. 231(c)(1). A person qualifies for that affirmative defense by (A) "requiring use of a credit card, debit account, adult access code, or adult personal identification number," (B) "accepting a digital certificate that verifies age," or (C) taking "any other reasonable measures that are feasible under available technology." *Ibid.*

c. In crafting COPA, Congress sought to "address[] the specific concerns raised by" this Court when it invalidated the CDA. H.R. Rep. No. 775, *supra*, at 12; accord S. Rep. No. 225, *supra*, at 2. First, the CDA applied to communications in e-mail, newsgroups, and chat rooms, and age screening was found not to be technologically feasible for those forms of communication. *Reno* v. *ACLU*, 521 U.S. at 851, 876-877. In contrast, COPA applies only to material posted on the World Wide Web, 47 U.S.C. 231(a)(1), where age screening is both technologically feasible and affordable. H.R. Rep. No. 775, *supra*, at 13-14.

Second, the CDA prohibited the display or transmittal of materials that were "indecent" or "patently offensive," without defining those terms, and the CDA did not indicate whether the "indecent" and "patently offensive" determinations "should be made with respect to minors or the population as a whole." *Reno* v. *ACLU*, 521 U.S. at 871 & n.37, 873, 877. COPA, by contrast, identifies the particular types of sexually explicit depictions, descriptions, or representations that may be considered patently offensive, and it is specifically limited to mate-

rial that is "patently offensive with respect to minors." 47 U.S.C. 231(e)(6)(B).

Third, because the CDA did not require that covered material appeal to the prurient interest or lack serious value for minors, it covered vast amounts of non-pornographic material having serious value. *Reno* v. *ACLU*, 521 U.S. at 873, 877-878. In contrast, COPA applies only to material that is designed to appeal to the prurient interest of minors and that, "taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." 47 U.S.C. 231(e)(6)(A) and (C).

Fourth, the CDA applied to nonprofit entities and to individuals posting messages on their own computers. It therefore included categories of speakers who might not be able to afford the cost of age screening. *Reno* v. *ACLU*, 521 U.S. at 856, 865, 877. In contrast, COPA applies only to persons who seek to profit from placing harmful-to-minors material on the Web as a regular course of their business. 47 U.S.C. 231(a)(1) and (e)(2). Such persons, Congress determined, can afford the costs of compliance. H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 7.[1]

d. Congress enacted legislative findings that explain the basis for COPA. Congress found that the "widespread availability of the Internet" continues to "present[] opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." 47 U.S.C. 231 note (Finding 1). Congress further determined that

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[1] COPA also reduces the age of minority from under age 18 to under age 17, and parents do not violate COPA when they permit their minor children to use the family computer to view material covered by the statute. See 47 U.S.C. 231(e)(7); H.R. Rep. No. 775, *supra*, at 15; S. Rep. No. 225, *supra*, at 6; *Reno* v. *ACLU*, 521 U.S. at 865-866, 878.

"the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." 47 U.S.C. 231 note (Finding 2). Congress noted that "the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation." 47 U.S.C. 231 note (Finding 3). It found, however, that "such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web." *Ibid.* Congress concluded that "a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest." 47 U.S.C. 231 note (Finding 4).

2. Before COPA became effective, a number of entities and individuals who maintain or seek access to Web sites filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking to invalidate COPA. Respondents alleged that COPA violates the First and Fifth Amendments to the Constitution, and they sought to enjoin its enforcement. *ACLU* v. *Reno*, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999). The district court entered a preliminary injunction against COPA's enforcement. *Id.* at 481-499.

The district court found that pornographic material is widely available for free on the Web, where minors can readily obtain access to it. 31 F. Supp. 2d at 484. The court also found that, even in 1999, adult identification systems were readily available and could enable Web publishers to prevent minors from obtaining access to harmful materials while still offering such material to adults. The court found, for example, that Web publish-

ers could place harmful material behind screens that allow access to the material only when the user provides a valid adult access code or a credit card number. *Id.* at 489-491. The court also found that, for a small annual fee, adults could obtain adult access codes to verify their age to Internet merchants using such a screen. *Ibid.*

Despite those findings, the district court determined that respondents were likely to show that COPA imposes an impermissible burden on speech that is protected for adults. 31 F. Supp. 2d at 495. The district court concluded that COPA might not be the "least restrictive means" of effecting Congress's compelling interest in protecting children from harmful speech, because the voluntary use of blocking software might be "at least as successful as COPA" in restricting minors' access to such material without imposing the same burden on constitutionally protected speech. *Id.* at 497. The court acknowledged that filter software blocks access to some sites that contain no harmful material, and that it permits access to some sites that contain such material. *Id.* at 492, 497. The court also noted that "[i]t is possible that a computer-savvy minor with some patience would be able to defeat the blocking device," and that "a minor's access to the Web is not restricted if [that minor] accesses the Web from an unblocked computer." *Id.* at 492. The court found it more significant, however, that software can block material on foreign Web sites and material on the Internet beyond the Web, and that some minors may be able to obtain access to credit cards and adult access codes. *Id.* at 492, 496-497.

The court of appeals affirmed on a different ground. *ACLU* v. *Reno*, 217 F.3d 162 (3d Cir. 2000). It held that COPA's reliance on "community standards" to identify material that is harmful to minors renders COPA fa-

cially unconstitutional, because it effectively requires persons who display material on the Web to comply with the community standards of the least tolerant community. *Id.* at 177.

3. This Court vacated and remanded for further proceedings. *Ashcroft* v. *ACLU*, 535 U.S. 564 (2002). In a judgment supported by several opinions, the Court held that "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 585 (plurality opinion). Accord *id.* at 586-589 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 589-591 (Breyer, J., concurring in part and concurring in the judgment) (concluding that any regional variations in the application of a national "community standard" "are not, from the perspective of the First Amendment, problematic"); see also *id.* at 597 (Kennedy, J., concurring in the judgment) ("[W]hether variation in community standards renders the Act substantially overbroad [cannot be determined] without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.").

4. On remand, the court of appeals once again affirmed the district court's grant of a preliminary injunction. App. 150a-212a. Based on a series of considerations, the court held that COPA violates the First Amendment.

a. The court first held that COPA's requirement that material be considered "as a whole" to determine whether it appeals to the prurient interest is not narrowly tailored to serve the government's compelling interest in protecting minors from the covered material. The court noted that, under this Court's obscenity decisions,

the First Amendment requires material to be considered "in context" in deciding whether it appeals to the prurient interest. App. 168a-171a. The court interpreted COPA to preclude such a contextual assessment. The court reasoned that, because COPA describes harmful material as "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind," 47 U.S.C. 231(e)(6), COPA's "as a whole" requirement actually "mandates evaluation of an exhibit on the Internet in isolation, rather than in context." App. 170a.

b. The court next concluded that COPA's "serious value" prong lacks sufficient precision. The court reasoned that, because COPA defines "minor" as "any person under 17 years of age," 47 U.S.C. 231(e)(7), Web publishers cannot know which minors should be considered in deciding whether material has serious value for minors. App. 172a. The court rejected the government's argument that the question under COPA is whether material has serious value for a legitimate minority of normal older adolescents. App. 171a-172a. The court acknowledged that, before COPA's enactment, state display laws with similar language had been construed to incorporate that standard or a similar one, App. 173a & n.16, but it concluded that Congress did not intend to incorporate that standard into COPA. App. 173a. The court also concluded that even if COPA incorporates the normal older adolescent standard, it still would not be "tailored narrowly enough to satisfy the First Amendment's requirements." App. 173a-176a.

c. The court of appeals also held that COPA's limitation to communications made "for commercial purposes," 47 U.S.C. 231(a)(1), does not sufficiently narrow COPA's reach. App. 176a-179a. The court criticized

COPA's "commercial purposes" limitation on the ground that it includes businesses that post harmful-to-minors material, even if they do not post such material "as the principal part of their business," and even if they seek to derive profit from the material through the sale of "advertising space" on the Web site rather than through the sale of the material itself. App. 176a-177a. The court rejected the government's reliance on COPA's definition of commercial purposes, which limits the reach of COPA to businesses that seek to profit from harmful-to-minors material "as a regular course" of their business. 47 U.S.C. 231(e)(2)(A) and (B). The court stated that the "regular course" requirement does not "place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes [harmful] material." App. 178a.

d. The court of appeals further held that although COPA affords an affirmative defense to businesses that use credit cards, adult access codes, or other means to prevent minors from obtaining access to harmful material, those methods of compliance unconstitutionally burden adult access to protected speech. App. 179a-185a. The court reasoned that "COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." App. 182a. The court also regarded COPA's affirmative defense as deficient because, while it furnishes protection against conviction, it "do[es] not provide the Web publishers with assurances of freedom from prosecution." App. 184a.

e. Next, the court of appeals held that filtering software "may be substantially less restrictive than COPA

in achieving COPA's objective of preventing a minor's access to harmful material." App. 193a; see App. 186a-195a. The court noted that the evidence before the district court had not conclusively established the extent to which filters are over- or underinclusive, and agreed with the district court that filters "*could* be at least as effective as COPA." App. 191a (emphasis added). The court concluded that "[t]he existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny." App. 195a.

f. Relying on the same considerations that led it to conclude COPA is not narrowly tailored, the court of appeals held that COPA is substantially overbroad. See App. 196a-206a. The court further concluded that COPA's reliance on community standards "exacerbates" those "constitutional problems." App. 204a. In a footnote, relying on the same considerations that led it to conclude that COPA's definition of "minors" is not narrowly tailored, the court held that definition unconstitutionally vague as well. App. 201a n.37.

5. By a vote of 5 to 4, this Court affirmed the preliminary injunction on "narrower, more specific grounds than the rationale the Court of Appeals adopted," and remanded the case for proceedings on the merits. *Ashcroft* v. *ACLU*, 542 U.S. 656, 665, 672-673 (2004). The Court expressly "decline[d] to consider the correctness of the other arguments relied on by the Court of Appeals." *Id.* at 665.

The Court decided that the district court had not abused its discretion by granting interim relief "[o]n this record." 542 U.S. at 666, 672-673. The Court focused exclusively on whether the preliminary-injunction record established that COPA was the least restrictive means of achieving Congress's purpose of protecting

children, or whether Congress might be able to achieve the same goal just as effectively by encouraging parents to use filtering software to regulate their children's Internet activity. *Id.* at 666, 669. In this respect, the Court found "a serious gap in the evidence as to the effectiveness of filtering software" as an alternative to COPA. *Id.* at 671; see *id.* at 668-669. The Court also noted that the limited record assembled in the district court was already five years old, "a serious flaw in any case involving the Internet." *Id.* at 671. In the absence of an adequate record, the Court stated, it would not "assume, without proof, that filters are less effective than COPA." *Ibid.* Rather, it left that factual question for evidentiary development in the district court. *Id.* at 671-673. The Court stressed, however, that it "d[id] not foreclose" the government from establishing that there is no equally effective, less restrictive alternative to COPA. *Id.* at 673.

6. After a bench trial, the district court permanently enjoined the Attorney General from enforcing COPA in any respect. App. 55a-149a. The court concluded that filters are a less restrictive alternative; that COPA is otherwise not narrowly tailored to the promotion of Congress's compelling interest; and that COPA is vague and overbroad.

a. The district court concluded that filter software would be both less restrictive and more effective than COPA. App. 79a-96a. The court determined that filters were readily available, easy to use, and able to block a very large fraction of the indecent Internet content that is harmful to minors. App. 86a-91a, 93a-96a. The court acknowledged that filters do make errors both in blocking and in failing to block. But it concluded that filters would be more effective than COPA in protecting chil-

dren who use the Internet. App. 134a. The court did not address the extent to which filters, despite their purported effectiveness and ease of use, are not currently being used by parents with Internet connections. See App. 86a-87a.

b. The court concluded that COPA is not narrowly tailored because it is both overinclusive and underinclusive. The court examined the definitions of "commercial purposes" and "minor" and found them too broad, causing the court to conclude that COPA prohibits too large a set of protected speech. App. 123a-124a. For instance, the court held that Web sites supported by advertising should not fall into the same definition of "commercial purposes" as sites engaged in the full-time commercial sale of pornography. App. 120a-121a. At the same time, the court concluded that COPA was underinclusive because it does not block foreign Web sites. App. 124a-127a.

The district court also found COPA's affirmative defense problematic. Although the court recognized that existing services provide age verification for Internet users, the court concluded that the affirmative defense was nonetheless "effectively unavailable" because those services are not foolproof and therefore do not provide perfect verification of Internet users' age. App. 106a-110a, 127a-128a. And the district court reiterated the court of appeals' earlier conclusion that the affirmative defense would burden speech, because a requirement to verify one's age (and possibly one's identity) before obtaining access to Internet content harmful to minors would deter potential readers from seeking access to content protected in that fashion. App. 128a-129a.

c. The district court also concluded that COPA is facially overbroad and vague, although it acknowledged

that its holding on those points was "merely supplemental." App. 136a n.10. The court concluded that a number of COPA's terms were ambiguous, such as the distinct scienter standards "knowingly" and "intentionally." App. 137a-138a. The court also concluded that the statute left ambiguous the degree to which a content provider must be "commercial" to qualify for coverage under COPA. App. 139a-140a. And the court reiterated the court of appeals' discussion of the term "minor" as creating an ambiguity. App. 139a-140a. The district court further held that those ambiguities could not be resolved (or COPA saved) by a narrowing construction. See App. 144a. For similar reasons, the district court concluded that COPA penalizes too much speech and is therefore fatally overbroad. See App. 143a-145a.

7. The court of appeals again affirmed. App. 1a-52a.

a. The court relied principally on the law-of-the-case doctrine. In the court's view, the panel that had ruled on the preliminary-injunction appeal had already resolved a number of the contested legal issues, and the court declined to re-examine any of those issues. App. 9a-15a.

Accordingly, the court of appeals relied on the preliminary-injunction panel's opinion to hold that COPA is not narrowly tailored, because it is overinclusive, App. 22a-23a; that the burden imposed by COPA's affirmative defense is categorically different from the burden imposed by blinder racks that screen adult magazines, App. 31a-32a; and that COPA is vague and overbroad, App. 47a-48a, 51a.

b. The court agreed with the district court that the affirmative defense under COPA is "'effectively unavailable,'" and thus does not make the statute any more narrowly tailored, because the means specified in the

statute "do not actually verify age." App. 29a (quoting App. 128a). And the court further concluded that, if employed, the affirmative defense would create an unconstitutional burden on Web publishers, because implementing the affirmative defense would have "high costs" and would result in "[t]he loss of traffic," because requiring age verification will deter users from visiting these Web sites. App. 30a-31a.

c. The court of appeals also agreed with the district court "that filters and the Government's promotion of filters are more effective than COPA," and that the First Amendment therefore required Congress to rely on that means of protecting children. App. 42a. The court relied principally on the notion that filters, and only filters, can block harmful content originating outside the United States. Although the United States contended that COPA regulates that content as well, the court of appeals read this Court's previous opinion to reach the "express conclusion" that COPA does not apply to foreign Web sites. App. 43a.

As for the evidence that approximately half of all parents do not use filters, the court of appeals dismissed that fact as irrelevant. Although the court "recognize[d] that some of those parents may be indifferent to what their children see," it speculated that others "trust that their children will voluntarily avoid harmful material on the Internet." App. 44a. The court therefore concluded that even though filters do not protect a substantial fraction of children, that "does not mean that filters are not an effective alternative to COPA." *Ibid.*

d. Although the court of appeals concluded that it was bound by the law of the case to hold that COPA is void for vagueness, based on a footnote in its prior opinion construing the term "minor," App. 47a-48a, the court

also agreed with the district court's identification of other terms as unconstitutionally vague. See App. 48a-49a; p. 15, *supra*. Accordingly, the court held that "COPA's use of the phrases and terms 'communication for commercial purposes,' 'as a whole,' 'intentional,' and 'knowing' renders it vague, for the reasons the District Court stated in its opinion." App. 48a-49a.

8. The court of appeals denied the government's petition for rehearing en banc. App. 53a-54a.

REASONS FOR GRANTING THE PETITION

The court of appeals has again held that the Child Online Protection Act violates the First Amendment, and this Court should again review that holding. If allowed to stand, the court's decision would permanently prevent the government from enforcing COPA, and it would leave millions of children unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web. The court's decision is also incorrect. COPA is the most effective means of advancing Congress's compelling interest in shielding children from the harmful effects of commercially marketed pornography on the Web. The statutory protections and affirmative defense that Congress crafted in response to this Court's decision in *Reno* v. *ACLU*, *supra*, are narrowly tailored to further that compelling interest. And COPA is neither substantially overbroad nor vague. In concluding otherwise, the court of appeals misinterpreted key terms in COPA and misapplied established First Amendment principles. Review by this Court is therefore warranted.

I. THE COURT OF APPEALS' INVALIDATION OF AN ACT OF CONGRESS WARRANTS REVIEW BY THIS COURT

The court of appeals has again invalidated the Act of Congress that was carefully crafted to further the compelling interest in protecting children from the harmful effects of pornography on the Web. Relying on the legal conclusions of a previous panel—conclusions that this Court declined to endorse when it previously reviewed this case—the court of appeals held that despite Congress's considered effort to draft a statute consistent with *Reno* v. *ACLU*, *supra*, COPA nonetheless suffers from the same failings as the earlier CDA. The court therefore affirmed a nationwide injunction that bars the Attorney General "from enforcing or prosecuting matters [under COPA] at any time for any conduct." App. 148a.

The court of appeals' decision renders an important Act of Congress a nullity and leaves children without enforceable protection against harmful online pornography. The court of appeals' reinstatement of its decision invalidating COPA clearly warrants this Court's review, just as the previous flawed decision did, especially now that the court of appeals has affirmed a final judgment that permanently enjoins the enforcement of COPA.

II. THE COURT OF APPEALS ERRED IN HOLDING COPA UNCONSTITUTIONAL

The court of appeals erred in invalidating COPA. COPA requires Web businesses that make harmful-to-minors communications as a regular course of their business to place such material behind age verification screens. 47 U.S.C. 231(a)(1) and (c)(1). COPA is modeled on state laws that require local stores to place pornographic material that is harmful to minors behind

blinder racks, in sealed wrappers, or in opaque covers. The courts have consistently upheld those display laws as a valid way to further the government's compelling interest in protecting minors from harmful material, without imposing an unreasonable burden on adults who seek access to such material.[2] COPA is constitutional for the same reason. Indeed, one of COPA's principal effects is merely to require commercial pornographers who already place much of their material behind screens to place their pornographic "teasers" behind those screens as well.

In nonetheless holding COPA unconstitutional, the court of appeals reiterated the constitutional objections set out in its previous opinion, which this Court declined to reach the last time the case was before the Court, and also concluded that COPA was less effective than filters. The court of appeals' analysis continues to lack merit.

This Court's previous decision principally focused on whether legislation promoting the use of filtering software would be an equally effective way of achieving the same goal. The evidence submitted below—much of it uncontroverted—demonstrates that it would not. Although filters are certainly one useful tool in shielding minors from harmful online content, they cannot do the job standing alone. Even after years of development that have made filters readily available, approximately

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[2] *Crawford* v. *Lungren*, 96 F.3d 380 (9th Cir. 1996), cert. denied, 520 U.S. 1117 (1997); *Davis-Kidd Booksellers, Inc.* v. *McWherter*, 866 S.W.2d 520 (Tenn. 1993); *American Booksellers* v. *Webb*, 919 F.2d 1493 (11th Cir. 1990), cert. denied, 500 U.S. 942 (1991); *American Booksellers Ass'n* v. *Virginia*, 882 F.2d 125 (4th Cir. 1989), cert. denied, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n* v. *City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co.* v. *Casado*, 721 F.2d 1281 (10th Cir. 1983).

half of all households with children and Internet access do not use them. The use of filters is manifestly less effective—and indeed, has no effect at all—in protecting the millions of children in those households from the concededly harmful materials to which COPA is addressed. Congress could properly conclude that those children deserve effective protection too, and that the compelling interest in protecting them is in no way negated by the fact that *other* children are protected by filters on the computers *they* use. Congress therefore reasonably determined that a meaningful response to that acknowledged problem—and accomplishment of the compelling governmental purpose of protecting children from material that is harmful to them—requires age verification by the content provider, not just voluntary implementation of filters by the Internet user. For the millions of children the Third Circuit's decision leaves unprotected, filters alone are not an alternative at all, much less a more effective one.

A. COPA Is Narrowly Tailored

1. The court of appeals adhered to the prior panel's holding that COPA is not narrowly tailored because its prohibition on communications that are made for commercial purposes and harmful to minors is overinclusive. App. 22a-23a; see App. 18a-19a, 171a-179a. But the statute narrowly confines its application to material that is knowingly posted to the Web as a regular part of a profit-seeking business, a definition that cures a deficiency this Court identified in the CDA. *Reno* v. *ACLU*, 521 U.S. 844, 877 (1997). And the definition of communications harmful to minors substantially tracks the definition this Court upheld in *Ginsberg* v. *New York*, 390 U.S. 629, 646 (1968). It parallels the definition of harm-

ful to minors in state display laws. *E.g.*, *Commonwealth* v. *American Booksellers Ass'n*, 372 S.E.2d 618, 621 (Va. 1988). And it is analogous to the definition of obscenity that this Court upheld in *Miller* v. *California*, 413 U.S. 15, 24 (1973).

a. The court of appeals erroneously relied on two features of COPA that had incorrectly been perceived by the preliminary-injunction panel as unconstitutional defects. First, the court of appeals held that COPA's "commercial purposes" limitation is not narrowly tailored. As the court acknowledged, under that provision, a business is not covered by COPA unless it seeks to profit from harmful-to-minors material "as a regular course" of its business. 47 U.S.C. 231(e)(2)(A) and (B). But the court viewed that limitation as insufficient because Web businesses are covered even when they do not post harmful material as "the principal part" of their business, and even when they seek to profit through the sale of "advertising space" rather than the sale of harmful material itself. App. 176a, 177a.

Congress did not act unconstitutionally in declining to limit COPA in the ways proposed by the court of appeals. COPA does not cover occasional or sporadic postings, because they are not part of the "regular course" of business. But there is no basis for requiring Congress to target profit-making harmful speech only when it is "the principal part" of a particular Web site. Speech harmful to minors remains harmful even when it amounts to "only" 49% of the hosting Web site's content. And imposing a "principal part" requirement—notwithstanding the difficulty of breaking down a Web site's content into precise fractions—would create a significant loophole into which commercial purveyors of pornography could readily seek to fit. COPA's commercial-

purposes definition keeps that loophole closed and ensures that minors receive the protection they need.

Congress's extension of COPA's obligations to businesses that seek to profit from harmful material by selling advertising space is also unproblematic. Businesses that seek to profit from harmful material presumptively have the resources to bear the modest cost of compliance with COPA, whether their profits come from a business model using subscription content or one using advertising. When such businesses post harmful material as a regular course of their business, the material poses just as great a threat to minors as when it is posted for sale.

b. The court of appeals also incorrectly adhered to the preliminary-injunction panel's holding that COPA is not narrowly tailored because it provides that speech is harmful to minors only if it "lacks serious * * * value for minors." The court of appeals thought that this provision would sweep in all content that meets the other two prongs of the harmful-to-minors definition if that content lacks serious value for *any* minor under age 17, from an infant to a teenager. App. 172-173a. That holding is misguided. Material does not "lack[] serious * * * value for minors" unless it lacks such value for *all* groups of minors, including the oldest group.[3]

The court of appeals thought that this construction is textually impossible—even if it is necessary to save the statute—because "minor" is defined to include "any person under 17 years of age." 47 U.S.C. 231(e)(7). The

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[3] The court of appeals appeared also to believe that the assessment of "serious * * * value" depends on the identity of the minor reading the specified material and therefore makes compliance too difficult for content providers. See App. 172a. That reading is incorrect; the material's value is assessed objectively, with respect to *minors*.

court was wrong, for two reasons. First, the operative provision considers whether material has value "for minors"—*i.e.*, for "any person[s]" under age 17, which would include those persons who constitute a legitimate minority of normal older adolescents. Second, Congress consciously used language that, in state laws regulating the display of content that is harmful to minors, has repeatedly been interpreted to incorporate the older-minor standard even when the definition of "minor" is at least as broad as COPA's. See *American Booksellers Ass'n*, 372 S.E.2d at 621, 624 (material has serious value for minors if it has serious value for a "legitimate minority of normal, older adolescents"); *Davis-Kidd*, 866 S.W.2d at 533, 534 (material has serious value for minors if it has serious value for "a reasonable seventeen year old minor"); *Webb*, 919 F.2d at 1504-1505, 1513 (same); see also H.R. Rep. No. 775, *supra*, at 13 (Congress intended to use the "familiar" definition as construed "over the years"). Because the older-minor interpretation is supported by the statutory text and context, the court of appeals erred in rejecting a construction that could avoid the constitutional difficulty the court perceived. *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

The court of appeals also stated that, even if COPA incorporates an older-minor standard, "the term 'minors' would not be tailored narrowly enough to satisfy strict scrutiny" because "too much uncertitude" would still remain. App. 175a. However, COPA's standard cannot be tailored further without eviscerating its protections for minors. Indeed, not surprisingly, the court of appeals expressly refused to "suggest how Congress

could have tailored its statute" in any more narrow way. *Ibid.*[4]

2. The court of appeals further erred in holding that COPA's affirmative defense does not aid in tailoring the statute narrowly. COPA provides "an affirmative defense to prosecution" for businesses that act in good faith to restrict access by minors to harmful material, such as by requiring an adult identification to obtain access. 47 U.S.C. 231(c)(1). The court of appeals held that that defense is "'effectively unavailable'" because, in the court's view, the methods that COPA contemplates as acceptable "do not actually verify age" with sufficient accuracy. App. 29a (quoting App. 128a). And the court simultaneously held that because content providers will conform to the requirements of the defense, too much Web content will be placed under access restrictions. App. 30a-31a. Neither holding is correct.

a. No system of age verification is foolproof, and the affirmative defense Congress crafted does not require such a foolproof system. Rather, the plain terms of the statute make clear that a content provider can obtain full immunity by using credit cards or other age-verification systems in good faith to control access to harmful content. The district court and the court of appeals thought that those systems "do not actually verify age," App. 29a, because some children might impersonate adults to get an online adult access code or gain access to their parents' credit cards, App. 26a-27a. But that conclusion—which was the sole basis the courts below

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[4] The court of appeals also concluded that COPA's definition of "minor" is "impermissibly vague" because it forces Web publishers to "guess at the bottom end of the range of ages to which the statute applies." App. 201a n.37; see App. 48a. Interpreting COPA to incorporate an older-minor standard eliminates that vagueness concern.

gave for concluding that the affirmative defense is "effectively unavailable," App. 29a—is entirely beside the point. The statute confers immunity on anyone who, in good faith, restricts access (*inter alia*) "by requiring use of a credit card, debit account, adult access code, or adult personal identification number." 47 U.S.C. 231(c)(1)(A). There is no requirement that any of those specified mechanisms in turn be shown in court to provide any particular degree of assurance of the user's age. Congress made a *categorical* judgment that the good-faith use of any one of those mechanisms satisfies COPA. And even if the statute could also be read in the way the court of appeals thought, the court gave no basis for refusing to apply the narrower construction, which would contribute to COPA's narrow tailoring.

b. The court of appeals concluded that the affirmative defense is itself problematic because, if a Web site conforms to the defense's standards, the provider will incur "high costs" and the users will be deterred by privacy concerns from seeking to gain access to the site. App. 31a. The court further rejected the government's argument that the burdens entailed are no different than those created by "blinder racks" used to prevent children from viewing adult magazines. The court instead held itself bound by the preliminary-injunction panel's ruling on this point, which had concluded that COPA places a greater burden on users' anonymity and imposes higher costs. App. 31a-32a.

Requiring an adult to present an adult access code, a valid credit card number, or similar proof of age to obtain access to harmful material is not an unreasonable burden, and indeed use of a credit card or other identifier is a common feature of doing business on the Internet. The court of appeals incorrectly concluded that

Congress's compelling interest in protecting minors from harmful material cannot justify those modest burdens without having an impermissible deterrent effect. But in upholding measures designed to protect children from harmful material, this Court and other courts have necessarily contemplated that those restrictions could be enforced by verifying customers' age and ensuring that they cannot obtain access to the harmful material without such verification. See note 2, *supra*; cf. *Sable Commc'ns of Cal., Inc.* v. *FCC*, 492 U.S. 115, 125 (1989) ("[T]here is no constitutional impediment to enacting a law which may impose [compliance] costs on a medium electing to provide [dial-a-porn] messages [that are lawful for some recipients but unlawful for others]."). Thus, for instance, a merchant may be required to keep adult magazines in a plastic wrapper or behind a counter off-limits to minors. A would-be reader may be required to verify his age by showing an identification card that also displays his name, and a reader or purchaser would in any event be visible to the seller and perhaps to other customers. Any resulting inconvenience or embarrassment is not a constitutionally significant burden. Cf. *United States* v. *American Library Ass'n*, 539 U.S. 194, 209 (2003) (plurality opinion); *id.* at 214-215 (Kennedy, J., concurring in the judgment); *id.* at 219 (Breyer, J., concurring in the judgment). Moreover, Internet users may be able to verify their age and gain access in private without communicating with a live human being at all—if anything, a *lesser* burden on privacy.[5]

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[5] As for the court of appeals' concern that electronic age verification risks "creat[ing] a potentially permanent electronic record" that the customer accessed indecent content, App. 32a, COPA addresses that concern with an express privacy guarantee, backed up with criminal penalties. 47 U.S.C. 231(d)(1); see 47 U.S.C. 501.

B. There Is No Alternative To COPA That Is Equally Effective

This Court remanded the case to permit the development of a full and updated record on the question whether Congress might have been able to find an equally effective, less restrictive alternative to COPA by promoting parents' use of blocking software. *Ashcroft* v. *ACLU*, 542 U.S. 656, 668-669, 670-673 (2004). The evidence adduced shows that blocking software has limitations that make it both less effective and less comprehensive. As no party disputes, blocking software is optional, and many parents do not use it. Furthermore, despite advances, the software still blocks some sites that do not contain harmful-to-minors material and misses some sites that do. For that reason and others, parents likely will *continue* not to use it, despite any encouragement from Congress. And relying solely on blocking software, while placing none of the responsibility on the operators of pornography-purveying Web sites, would mean that whenever a child can obtain unrestricted access to a Web browser—by gaining access to a computer without filtering software or by circumventing the software in place—the entire universe of harmful speech on the Web would be open to him. As applied to commercial Web sites in the United States that display harmful material as a regular course of their businesses, COPA's screening requirement is far more effective in protecting all children.

The court of appeals, like the district court, reached the contrary conclusion by conducting a flawed analysis. First, the relevant comparison is between COPA and measures to encourage the use of filters, not between COPA and a hypothetical world in which all parents and others install filters and ensure their use on all comput-

ers to which a child has access. See *Ashcroft* v. *ACLU*, 542 U.S. at 669, 670. The evidence submitted at trial showed that approximately half of all parents with Internet access do not use filters and that government action, such as publishing reviews of the quality of competing filter products, would not increase their use. *E.g.*, C.A. App. 159-160, 439, 537-544. But the district court made no findings at all on the extent of filter use or whether *any* action by Congress could increase filter use. And even if there were some marginal increase in the use of filters as a result of encouragement by Congress, there still would be vast numbers of children left unprotected.

To the extent the court of appeals thought the proper comparison of effective alternatives was simply between COPA and filtering software, it misread this Court's opinion. As this Court repeatedly emphasized, it was considering a record that it acknowledged was limited, and it was reviewing the issuance of an injunction on these grounds for abuse of discretion. See *Ashcroft* v. *ACLU*, 542 U.S. at 660, 664-665, 666, 668-669, 670, 671, 673. Now that the fully developed record has shown the extent to which filtering software does not protect children, especially the millions of children who have access to computers without filters, the court of appeals erred in rigidly examining only the efficacy of filtering software.

Second, because of this incorrect focus, the courts below gave inadequate treatment to problems with filters that, the government's evidence showed, prevent them from being widely used and trusted. Although the district court acknowledged that filters "are prone to some over and under blocking," App. 134a, it declined to address the extent of overblocking, *i.e.*, the problem that

filters will block legitimate sites. App. 90a. Nor did it address the government's evidence that frustration with overblocking causes parents to remove filters. See C.A. App. 1561. The court also asserted that filters are "difficult for children to circumvent" by technical means (such as proxy servers). App. 92a. That conclusion is dubious in itself. See *ACLU* v. *Reno*, 31 F. Supp. 2d at 492 ("It is possible that a computer-savvy minor with some patience would be able to defeat the blocking device."). But even if it were not, it does not address an equally significant problem with relying on parents' voluntary implementation of filters: children may simply be able to obtain their parents' passwords. These inherent limitations on filters' effectiveness are a necessary part of any comparison between COPA and increased use of filters, but neither the district court nor the court of appeals addressed them.

Instead, the court of appeals speculated (unsupported by any factual findings) that parents do not use filters "because they trust their children" to "voluntarily avoid harmful material on the Internet." App. 44a. The court's speculation essentially treats Congress's concededly compelling interest in affirmatively protecting children from harmful material on the Internet as no interest at all.

Third, the court of appeals relied in part on a misreading of this Court's previous opinion. The court concluded that COPA does not reach foreign Web sites and that, as a result, any filtering software that *does* block some foreign Web sites must be "more effective in advancing Congress's interest." App. 43a. The government had explained that COPA *does* apply to foreign Web sites and, indeed, that as a practical matter many "foreign" pornographic sites are hosted on computer

servers in the United States. Gov't C.A. Br. 53-54; see also 47 U.S.C. 231(a)(1) (application to material in "foreign commerce"). The court of appeals, however, asserted that this Court "already ha[d] rejected [this] construction of the statute." App. 43a. But in suggesting that "COPA does not prevent minors from having access to * * * foreign harmful materials," this Court was not definitively construing the statute; rather, it was noting for future factual development the "*possib[ility]* that filtering software *might* be more effective" than COPA. 542 U.S. at 667 (emphases added). In fact, respondents had contended in this Court only that COPA "*cannot* restrict this content," presumably for practical reasons. Resp. Br. at 14, *Ashcroft* v. *ACLU*, *supra* (No. 03-218). And although the government acknowledged that "enforcement of COPA against foreign sites may involve practical difficulties," it did not suggest that the statute *barred* such enforcement efforts. U.S. Reply Br. at 16, *Ashcroft* v. *ACLU*, *supra* (No. 03-218).

Thus, the plain terms of COPA apply to foreign commerce. In any event, the unrebutted evidence demonstrates that a large proportion of the harmful pornographic content on the Web either originates from or is hosted on servers in the United States. *E.g.*, C.A. App. 772, 867-869. That sort of evidence was precisely what this Court contemplated that the government would amass on remand, and the court of appeals erred in regarding the issue as foreclosed by the very opinion in which this Court ordered the remand.

C. COPA Is Not Substantially Overbroad Or Vague

The court of appeals further erred in holding that COPA is substantially overbroad and vague on its face, with the result that it cannot be applied even to commer-

cial pornographers whose activities are unquestionably within the scope of constitutional regulation. In reaching that conclusion, the court relied on the same considerations that led it to conclude that COPA is not narrowly tailored. The court's flawed narrow-tailoring analysis therefore infected its overbreadth analysis as well.

1. The preliminary-injunction panel thought that COPA covers significantly more speech than necessary to achieve Congress's purpose, and accordingly found the statute overbroad. The court of appeals then adhered to that ruling in affirming the final judgment on overbreadth grounds. See App. 50a-51a. But the court of appeals' overbreadth holding overlapped substantially with its narrow-tailoring analysis, which as set forth above was erroneous. Indeed, the court's rejection of narrowing constructions was essential to its overbreadth holding. See App. 51a. For instance, as an essential part of its analysis, the court read COPA's requirement to consider material "as a whole" as an instruction *not* to consider the context in which a particular image or communication appears on the Web. App. 50a, 170a-172a; see also App. 17a-18a (alluding to, but not relying on, that interpretation of "as a whole" in discussing narrow tailoring). But in fact, "as a whole" is most naturally read (and certainly can permissibly be construed) to *include* consideration of context, which the court of appeals effectively acknowledged would resolve the objection it raised. App. 198a; see U.S. Br. at 26-29, *Ashcroft* v. *ACLU*, *supra* (No. 03-218).

That sensible construction of "as a whole" also refutes all three of the court of appeals' attempts to identify examples of protected speech that would unnecessarily be affected by COPA. See App. 198a-200a. Thus, neither in its preliminary-injunctior opinion nor in the

instant opinion did the court of appeals identify *any* protected speech that would be unnecessarily affected by COPA, properly construed. There certainly has been no showing that COPA is *substantially* overbroad, "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." *United States* v. *Williams*, 128 S. Ct. 1830, 1838 (2008).

2. The court of appeals also held that COPA is vague in four respects: the set of minors that the statute's definition of "harm to minors" incorporates; the meaning of the scienter standards "knowingly" and "intentionally"; the scope of a "communication for commercial purposes"; and the application in the Internet context of the concept of evaluating a work "as a whole." App. 48a. The court gave no reasoning; it relied on a footnote in the preliminary-injunction panel's opinion, App. 201a n.37, or on the district court's analysis, App. 137a-142a. The court's cursory but sweeping vagueness holding was likewise in error. Here, too, the court found facial invalidity only by refusing to consider constitutional-avoidance constructions. For instance, the court thought that the word "minor" was impermissibly vague because Congress must have meant to cover children only beginning at some indeterminate age, rather than all children under 17. But as discussed above, the legitimate-value prong of the "harmful to minors" definition is properly construed in this context to refer to older minors, a much narrower and more discrete category. See pp. 22-24, *supra*.

Because the same errors that undermined the court's narrow-tailoring analysis are present in its vagueness ruling, that additional ground for invalidating the statute fails as well.

* * * * *

The upshot is that the court of appeals has permanently enjoined an important Act of Congress, enacted to protect the well-being of the Nation's youth, based on a misinterpretation of the statute's terms, of this Court's precedents, and of the record in this case. While it is unfortunate that this case necessitates review in this Court again, the court of appeals' decision permanently enjoining COPA calls out just as strongly—if not more so—for this Court's review than did the court of appeals' decisions preliminarily enjoining that statute.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No.

In the Supreme Court of the United States

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2539
D.C. Civ. No. 98-cv-05591

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC., D/B/A A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., D/B/A CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.; PLANETOUT, INC.; HEATHER CORINNA REARICK; NERVE.COM, INC.; AARON PECKHAM, D/B/A URBAN DICTIONARY; PUBLIC COMMUNICATORS, INC.; DAN SAVAGE; SEXUAL HEALTH NETWORK

v.

*MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES

MICHAEL B. MUKASEY, APPELLANT

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
Honorable Lowell A. Reed, District Judge

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* Substituted as per FRAP 43(b).

Argued: June 10, 2008
Filed: July 22, 2008

OPINION OF THE COURT

Before: AMBRO, CHAGARES, and GREENBERG, *Circuit Judges*.

GREENBERG, *Circuit Judge*.

I. INTRODUCTION

This matter comes on before this Court on an appeal from an order of the District Court entered March 22, 2007, finding that the Child Online Protection Act ("COPA"), 47 U.S.C. § 231, facially violates the First and Fifth Amendments of the Constitution and permanently enjoining the Attorney General from enforcing COPA. The Government challenges the District Court's conclusions that: (1) COPA is not narrowly tailored to advance the Government's compelling interest in protecting children from harmful material on the World Wide Web ("Web"); (2) there are less restrictive, equally effective alternatives to COPA; and (3) COPA is impermissibly overbroad and vague. We will affirm.

II. FACTS AND PROCEDURAL HISTORY

It is useful at the outset to set forth a short history of the background of COPA and an explanation of the relationship between the Web and the Internet. Congress enacted COPA to protect minors from exposure to

sexually explicit material on the Web. The Web is just one portion of the Internet, which "is an interactive medium based on a decentralized network of computers." *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775, 781 (E.D. Pa. 2007) ("*Gonzales*"). "The Internet may also be used to engage in other activities such as sending and receiving emails, trading files, exchanging instant messages, chatting online, streaming audio and video, and making voice calls." *Id.* The District Court described how the Web functions:

> On the Web, a client program called a Web browser retrieves information from the Internet, such as Web pages and other computer files using their network addresses and displays them, typically on a computer monitor. . . . Web pages, which can contain, *inter alia*, text, still and moving picture files, sound files, and computer scripts, are often arranged in collections of related material called Web sites, which consist of one or more Web pages. . . . It is estimated that there are between 25 and 64 billion Web pages on the surface portion of the Web ('Surface Web') —that is, the portion of the Web that is capable of being indexed by search engines. These Web pages may be displayed on a monitor screen and, thus, the content may be seen by anyone operating a computer or other Internet capable device which is properly connected to the Internet.

Id. at 781-82 (citations omitted). The District Court indicated that "[a] little more than 1 percent of all Web pages on the Surface Web (amounting to approximately 275 million to 700 million Web pages) are sexually explicit." *Id.* at 788.

COPA provides for civil and criminal penalties—including up to six months imprisonment—for anyone who knowingly posts "material that is harmful to minors" on the Web "for commercial purposes." 47 U.S.C. § 231(a)(1). "Intentional" violations result in heavier fines. *Id.* at § 231(a)(2). "[M]aterial that is harmful to minors" includes any communication that is obscene or that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

Id. at § 231(e)(6). "The term 'minor' means any person under 17 years of age." *Id.* at § 231(e)(7). A person makes a communication "for commercial purposes" only if the person when making the communication "is engaged in the business of making such communications." *Id.* at § 231(e)(2)(A). A person is "engaged in the business" when the person:

> devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities . . . . [and] only if the person knowingly causes [or solicits] the material that is

> harmful to minors to be posted on the World Wide Web . . . .

Id. at § 231(e)(2)(B). A Web publisher can assert an affirmative defense to prosecution under COPA if he or she:

> has restricted access by minors to material that is harmful to minors—(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.

Id. at § 231(c)(1).

Congress enacted COPA after the Supreme Court declared Congress's first attempt to protect minors from exposure to sexually explicit materials on the Web to be unconstitutional. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329 (1997) (holding that the Communications Decency Act violated the First Amendment). The day after COPA became law on October 21, 1998, plaintiffs, consisting of speakers, content providers, and users of the Web, filed this action in the District Court seeking an injunction barring COPA's enforcement. On February 1, 1999, the District Court preliminarily enjoined the Government from enforcing COPA pending a trial on the merits. *American Civil Liberties Union v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). In its opinion the court pointed out, among many other things, that the plaintiffs suggested that filtering and blocking technology was an "example of a more efficacious and less restrictive means to shield minors from harmful materials" than COPA but that the final deter-

mination of whether this was so "must await trial on the merits." *Id.* at 497.

The Government appealed but we affirmed the District Court's order after concluding that the "community standards" language in section 231(e)(6)(A) by itself rendered COPA unconstitutionally overbroad. *American Civil Liberties Union v. Reno*, 217 F.3d 162, 173 (3d Cir. 2000) ("*ACLU* I"). The Government then sought and obtained certiorari and the Supreme Court vacated our decision and remanded the case to us for further proceedings because the Court concluded that the "community standards" language did not, standing alone, make the statute unconstitutionally overbroad. *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 585, 122 S. Ct. 1700, 1713 (2002).

On the remand we ruled that, for a variety of reasons, COPA was not narrowly tailored to serve the Government's compelling interest in preventing minors from being exposed to harmful material on the Web, was not the least restrictive means available to effect that interest, and was substantially overbroad. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251-271 (3d Cir. 2003) ("*ACLU* II"). Consequently, we again affirmed the District Court's order granting the preliminary injunction. *Id.* at 271. The Government again sought and obtained certiorari but this time the Supreme Court affirmed our decision though it remanded the case to the District Court for a trial on the merits. The Court contemplated that the record would be updated on the remand to reflect the then current technological developments and to account for any changes in the legal landscape. The Court further directed that the District Court determine whether Internet content fil-

ters are more effective than enforcement of the COPA restrictions or whether other possible alternatives are less restrictive and more effective than COPA to effectuate Congress's intention. *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 670-73, 124 S. Ct. 2783, 2794-95 (2004).

After a bench trial, the District Court on March 22, 2007, issued extensive findings of fact, determined that plaintiffs have standing to maintain this action, and concluded that:

> COPA facially violates the First and Fifth Amendment rights of the plaintiffs because: (1) COPA is not narrowly tailored to the compelling interest of Congress; (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and (3) COPA is impermissibly vague and overbroad.

Gonzales, 478 F. Supp. 2d at 821. The District Court permanently enjoined the Attorney General and his officers, agents, employees, and attorneys, and those persons in active concert or participation with him who received actual notice of its order, from enforcing or prosecuting matters premised upon COPA at any time for any conduct. *Id.*

The Government then filed a timely appeal to this Court.

III. JURISDICTION AND STANDARD OF REVIEW

The District Court had jurisdiction under 28 U.S.C. § 1331 and we have jurisdiction pursuant to 28 U.S.C. § 1291. We review the constitutionality of a federal stat-

ute and related questions of statutory interpretation de novo. *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 311 (3d Cir. 2001). Although we generally review a district court's factual findings for clear error, "[i]n the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record." *United States v. Scarfo*, 263 F.3d 80, 91 (3d Cir. 2001). The Supreme Court has emphasized that "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S. Ct. 1949, 1958 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 728-29 (1964)).

IV. DISCUSSION

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. Const. amend. I. COPA criminalizes a category of speech—"harmful to minors" material—that is constitutionally protected for adults. Because COPA is a content-based restriction on protected speech, it is presumptively invalid and the Government bears the burden of showing its constitutionality. *Ashcroft*, 542 U.S. at 660, 124 S. Ct. at 2788.

The Government challenges the District Court's decision that COPA facially violated plaintiffs' First Amendment rights because it was not narrowly tailored to further a compelling government interest, i.e., was not the least restrictive alternative to advance that interest, the prevention of minors from being exposed to harmful

material on the Web, and was impermissibly vague and overbroad.[1]

A. Law-of-the-Case Doctrine

Before we reach the merits of the case, we must address the effect of our prior decision in *ACLU II* on this appeal, as the presence of that decision may make the law-of-the-case doctrine relevant here. Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S. Ct. 2166, 2177 (1988) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983)). "This rule of practice promotes the finality and efficiency of the judicial process by protecting against the agitation of settled issues." *Id.* (citation and quotation marks omitted).

We recently addressed the binding effect that our prior decisions on legal issues at the preliminary injunction stage on an earlier appeal in the same case have on later decisions. *See Pitt News v. Pappert*, 379 F.3d 96, 104-05 (3d Cir. 2004). Clearly the nature of the showing that an applicant for a preliminary injunction must make to obtain relief can present special difficulties in applying the law-of-the-case doctrine in later stages of the litigation. In *Pitt News* we noted that "three separate rules are relevant" when considering the effect of a preliminary injunction later in ongoing litigation:

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[1] The Government, however, does not challenge the District Court's determination that plaintiffs have standing to bring this action.

> First, it is our Court's tradition that a panel may not overrule 'a holding' of a prior panel. Second, it is well established that neither this tradition nor the law-of-the-case doctrine requires a panel hearing an appeal from the entry of a final judgment to follow the legal analysis contained in a prior panel decision addressing the question whether a party that moved for preliminary injunctive relief showed a likelihood of success on the merits. Third, although a panel entertaining a preliminary injunction appeal generally decides only whether the district court abused its discretion in ruling on the request for relief and generally does not go into the merits any farther than is necessary to determine whether the moving party established a likelihood of success, a panel is not always required to take this narrow approach. If a preliminary injunction appeal presents a question of law and the facts are established or of no controlling relevance, the panel *may* decide the merits of the claim.

Id. at 104-05 (citations and most internal quotation marks omitted). We explained:

> In the typical situation—where the prior panel stopped at the question of likelihood of success—the prior panel's legal analysis must be carefully considered, but it is not binding on the later panel. Indeed, particularly where important First Amendment issues are raised, the later panel has a duty, in the end, to exercise its own best judgment. On the other hand, if the first panel does not stop at the question of likelihood of success and instead addresses the merits, the later panel, in accordance with our Court's traditional practice, should regard itself as bound by the prior panel's opinion.

Id. at 105.

But even if we subsequently conclude that in a particular case our prior determination ordinarily would bind us, we may reconsider issues that we previously resolved if any of the following "extraordinary circumstances" are present: "(1) there has been an intervening change in the law; (2) new evidence has become available; or (3) reconsideration is necessary to prevent clear error or a manifest injustice." *Council of Alternative Political Parties v. Hooks*, 179 F.3d 64, 69 (3d Cir. 1999) (citing *In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998)).

In *ACLU II* we concluded that plaintiffs were likely to succeed on the merits and thus concluded that the District Court could grant them a preliminary injunction. Nevertheless we did not stop our analysis after coming to that conclusion. Instead, we opined at length on the constitutionality of COPA and construed a number of terms of the statute. Consequently, the procedural posture of this case and the scope of our prior decision has set a foundation for the possible applicability of the law-of-the-case doctrine here.

Though we will explain in more detail the basis for our conclusions in *ACLU II*, for purposes of determining the binding effect of that decision on this appeal it is enough to note now that we expressly held the following: (1) COPA's definitions of "material that is harmful to minors," and "commercial purposes" and COPA's affirmative defenses are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material on the Web, 322 F.3d at 251; (2) filtering software is a less restrictive alternative than

the COPA restrictions to advance the Government's compelling interest in preventing minors from being exposed to harmful material on the Web, *id.* at 265; (3) COPA is "substantially overbroad" because of its use of the terms "material harmful to minors," "minor," "commercial purposes," and "community standards"; (4) COPA's affirmative defenses do not save the statute from sweeping too broadly; and (5) a narrowing construction of COPA is not available to permit it to be upheld, *id.* at 266-71.

In its decision affirming *ACLU II*, the Supreme Court expressly declined to consider many of the issues that we had determined. Specifically, the Court stated:

> [W]e agree with the Court of Appeals that the District Court did not abuse its discretion in entering the preliminary injunction. Our reasoning in support of this conclusion, however, is based on narrower, more specific grounds than the rationale the Court of Appeals adopted. The Court of Appeals, in its opinion affirming the decision of the District Court, construed a number of terms in the statute, and held that COPA, so construed, was unconstitutional. None of those constructions of statutory terminology, however, were relied on by or necessary to the conclusions of the District Court. Instead, the District Court concluded only that the statute was likely to burden some speech that is protected for adults, which [the Government] does not dispute. As to the definitional disputes, the District Court concluded only that [the plaintiffs'] interpretation was 'not unreasonable,' and relied on their interpretation only to conclude that [the plaintiffs] had standing to challenge the statute, which, again, [the Government]

> does not dispute. Because we affirm the District Court's decision to grant the preliminary injunction for the reasons relied on by the District Court, we decline to consider the correctness of the other arguments relied on by the Court of Appeals.

Ashcroft, 542 U.S. at 665, 124 S. Ct. at 2791 (citations omitted). The Court then addressed the issue of whether there are less restrictive alternatives to the COPA restrictions to further the Government's compelling interest in COPA's objective and stated that "[f]ilters are less restrictive than COPA." *Id.* at 667, 124 S. Ct. at 2792. The Court recognized, however, that "there are substantial factual disputes remaining in the case. . . [T]here is a serious gap in the evidence as to the effectiveness of filtering software. For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role." *Id.* at 671, 124 S. Ct. at 2794 (citation omitted). Thus, the Court recognized that restrictiveness and effectiveness are separate matters. The Court also noted that:

> [T]he factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago . . . . It is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time. More and better filtering alternatives may exist than when the District Court entered its findings.

Id. Accordingly, the Court decided to remand the case to the District Court for a full trial on the merits to "update and supplement the factual record to reflect current technological realities" and "to take account of a changed legal landscape" to determine if other methods were less restrictive alternatives to COPA to further the Government's compelling interest in its objective. *Id.* at 672, 124 S. Ct. at 2795.

The Government contends that the portion of our opinion in *ACLU II* that goes beyond the Supreme Court's holding "is not binding because the Supreme Court's decision remanding for further consideration of the question whether filtering is a less restrictive alternative than COPA contemplates a fresh examination of all the issues in this case, including the scope of COPA's coverage and its efficacy and restrictiveness compared to filtering." Appellant's Letter at 1 (May 30, 2008).[2] We conclude, however, that the Government is incorrect on this point. The Supreme Court's decision explicitly left untouched our conclusions in *ACLU II* other than our decision that filters are a less restrictive alternative than COPA for advancing the Government's compelling interest at stake in this litigation. Moreover, our other determinations—including our interpretation of the provisions of COPA and whether they are narrowly construed or impermissibly overbroad—did not depend on the factual record and thus would not be implicated by the evidence developed in the subsequent trial on the merits in the District Court. Accordingly, those conclusions remain binding on us now.

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[2] The Government wrote this letter in response to our request that the parties file supplemental letter briefs on the law-of-the-case issue.

The Government also contends that we should reconsider the issues addressed in *ACLU II* on the basis of an intervening change in the law since we decided that case. In this regard it points to the Supreme Court's recent decision in *United States v. Williams*, 128 S. Ct. 1830 (2008), where the Court found that the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, 18 U.S.C. § 2252A(a)(3)(B), is not overbroad under the First Amendment. But the Court in *Williams* merely restated and applied the well-established legal doctrines of overbreadth and vagueness and did not change the law applicable to this case. Accordingly, we conclude that there are not "extraordinary circumstances" justifying us in departing from our holdings in *ACLU II* other than that with respect to filtering.

Now that we have delineated the contours of *ACLU II*'s effect on this appeal, we will address the issues the Government raises. As we consider these issues, we will determine whether, and if so the extent, that our conclusions in *ACLU II* are the law-of-the-case here.

B. Strict Scrutiny

First, the Government challenges the District Court's decision that COPA is unconstitutional because it does not survive strict scrutiny, the standard that we apply in this case inasmuch as COPA is a content-based restriction on speech. *See Turner Broadcasting Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459 (1994). To survive strict scrutiny analysis, a statute must: (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advanc-

ing that interest. *Sable Commc'ns of Cal., Inc. v. Fed. Commc'ns Comm'n*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836 (1989).

1. Compelling Interest

As we noted above, Congress enacted COPA to protect minors from exposure to sexually explicit material on the Web. The Supreme Court has held that "there is a compelling interest in protecting the physical and psychological well-being of minors," *Sable*, 492 U.S. at 126, 109 S. Ct. at 2836, and the parties agree that the Government has a compelling interest to protect minors from exposure to harmful material on the Web. Inasmuch as we agree with them on that point, we turn to the question of whether COPA is narrowly tailored to effectuate its purpose.

2. Narrowly Tailored

As we stated above, to survive a strict scrutiny analysis COPA must be narrowly tailored to advance a compelling government interest. In *ACLU II*, we addressed this issue and held that the following provisions of COPA are not narrowly tailored:

> (a) the definition of 'material that is harmful to minors,' which includes the concept of taking '*as a whole*' material designed to appeal to the 'prurient interest' of minors; and material which (when judged as a whole) lacks 'serious literary' or other 'value' *for minors*; (b) the definition of 'commercial purposes,' which limits the reach of the statute to persons '*engaged in the business*' (broadly defined) of making communications of material that is harmful to minors; and (c) the '*affirmative defenses*' available to

> publishers, which require the technological screening of users for the purpose of age verification.

ACLU II, 322 F.3d at 251.

First, we addressed why we found that the "taking the material as a whole" language in COPA's definition of "material that is harmful to minors," was not narrowly tailored. COPA defines such material to include any matter that is obscene or that:

> (A) the average person, applying contemporary community standards, would find, *taking the material as a whole* and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest; (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and (C) *taken as a whole*, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6) (emphasis added). We concluded that the taken "as a whole" language, when read in context with other language in the statute, mandates evaluation of an exhibit on the Internet in isolation, rather than in context. *ACLU II*, 322 F.3d at 253. We explained that:

> Because we view such a statute, construed as its own text unquestionably requires, as pertaining only to single individual exhibits, COPA endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of

> harmful materials legitimately targeted under COPA, i.e., material that is obscene as to minors. Accordingly, while COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults. Thus, in our opinion, the Act, which proscribes publication of material harmful to minors, is not narrowly tailored to serve the Government's stated purpose in protecting minors from such material.

Id. (citation omitted).

We also explained why we found that "COPA's definition of the term 'minor,' viewed in conjunction with the 'material harmful to minors' test, is not tailored narrowly enough to satisfy the First Amendment's requirements." *Id.* at 255. COPA defines "minor" as "any person under 17 years of age." 47 U.S.C. § 231(e)(7). We stated that the term "thus applies in a literal sense to an infant, a five-year old, or a person just shy of age seventeen." *ACLU II*, 322 F.3d at 254. We reasoned that "Web publishers would face great uncertainty in deciding what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability." *Id.* at 255. We explicitly rejected the Government's argument that the term "should be read to apply only to normal, older adolescents," *id.* at 254, and stated that under either our definition or the Government's proffered definition, "the term 'minor,' viewed in conjunction with the 'material harmful to minors' test, is not tailored narrowly enough to satisfy the First Amendment's requirements," *id.* at 255.

We then proceeded to explain why we found that "COPA's purported limitation of liability to persons making communications 'for commercial purposes' does not narrow the reach of COPA sufficiently." *Id.* at 256. COPA states that "[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications," and that

> [t]he term 'engaged in the business' means that the person who makes a communication . . . that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit . . . . A person may be considered to be engaged in the business . . . only if the person knowingly causes [or solicits] the material that is harmful to minors to be posted on the World Wide Web . . . .

47 U.S.C. § 231(e)(2). We stated that:

> we read COPA to apply to Web publishers who have posted *any* material that is 'harmful to minors' on their Web sites, even if they do not make a profit from such material itself or do not post such material as the principal part of their business. Under the plain language of COPA, a Web publisher will be subjected to liability if even a small part of his or her Web site displays material 'harmful to minors.'

ACLU II, 322 F.3d at 256. We stated that this group included "those persons who sell advertising space on their otherwise noncommercial Web sites . . . [, including] the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps

only to defray the cost of maintaining the Web site." *Id.* We also rejected the Government's argument that "COPA's definition of 'engaged in the business' limits liability to those persons who publish material that is harmful to minors 'as a regular course of such person's business or trade'":

> COPA's use of the phrase 'regular course' does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes such material. Thus, even if posted material that is harmful to minors constitutes only a very small, or even infinitesimal, part of a publisher's entire Web site, the publisher may still be subject to liability.

Id. at 257.

Finally, we explained why we found that COPA's affirmative defenses were not narrowly tailored. As we already have noted above, a Web publisher can assert an affirmative defense if it:

> has restricted access by minors to material that is harmful to minors—(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number; (B) by accepting a digital certificate that verifies age; or (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1). We first stated that implementation of the affirmative defenses in COPA "will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide

identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial." *ACLU II*, 322 F.3d at 259 (footnote omitted). For this particular conclusion we relied on factual findings the District Court made in granting the preliminary injunction, so to this extent it does not bind us on this appeal.

Though we are not bound by previous conclusions with respect to deterrence of adults seeking restricted content, in *ACLU II* we reached other conclusions about COPA's affirmative defenses that do not depend on the facts as developed in the District Court, and those conclusions are binding on us on this appeal. For instance, in *ACLU II* we stated that "the affirmative defenses do not provide Web publishers with assurances of freedom from prosecution" because "'[a]n affirmative defense applies only after prosecution has begun, and the speaker must himself prove . . . that his conduct falls within the affirmative defense.'" *Id.* at 260 (second alteration in original) (quoting *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255, 122 S. Ct. 1389, 1404 (2002)). We also considered the Government's argument that other cases dealing with display restrictions have upheld the use of blinder racks to shield minors from viewing harmful material. We distinguished those cases because:

> [t]he use of 'blinder racks' . . . does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens. Blinder racks do not require adults to compromise their anonymity in their viewing of material harmful to minors, nor do they create any financial burden on the user. Moreover, they do not burden the speech con-

> tained in the targeted publications any more than is absolutely necessary to shield minors from its content.

Id. We concluded that "[t]he effect of the affirmative defenses, as they burden 'material harmful to minors' which is constitutionally protected for adults, is to drive this protected speech from the marketplace of ideas on the Internet. This type of regulation is prohibited under the First Amendment." *Id.*

In its decision made after the trial on the merits now on appeal before us, the District Court concluded that COPA is not narrowly tailored because it is both overinclusive and underinclusive. First, the court determined that COPA is impermissibly overinclusive because it "prohibits much more speech than is necessary to further Congress' compelling interest. For example, . . . the definitions of 'commercial purposes' and 'engaged in the business' apply to an inordinate amount of Internet speech and certainly cover more than just commercial pornographers . . . ." *Gonzales*, 478 F. Supp. 2d at 810 (citations omitted). The court also concluded that COPA is overinclusive because it "applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors . . . " *Id.*

The Government contends that COPA is narrowly tailored because it applies only to commercial pornographers and only to material that is harmful to "older" minors. But we addressed and rejected the Government's arguments in *ACLU II*, when we found there is nothing in the text of COPA to limit its application solely to "commercial pornographers" or to limit the phrase

"material that is harmful to minors" to include material that only is harmful to "older" minors. *See* 322 F.3d at 253-57. Our prior decision is binding on these issues on this appeal.

The District Court also found that COPA is not narrowly tailored because it is underinclusive. In *ACLU II* we did not address whether COPA is impermissibly underinclusive and so we are free to review this finding on the merits. In its Findings of Fact, the District Court stated that "a substantial number (approximately 50 percent) of sexually explicit websites are foreign in origin." *Gonzales*, 478 F. Supp. 2d at 789. The court then reasoned:

> [T]here is a significant amount of sexually explicit material on the Internet which originates from outside of the United States. . . . [U]nlike Internet content filters which are able to block from view unsuitable material regardless of its origin, COPA has no extra-territorial application. As a result, . . . COPA is not applicable to a large amount of material that is unsuitable for children which originates overseas but is nevertheless available to children in the United States . . . . COPA's lack of extraterritorial application renders it underinclusive.

Id. at 810-11 (citations omitted). The Government contends that the District Court erred by construing COPA not to apply to foreign Web sites, and thus the Government argues that COPA is not underinclusive.

The problem with the Government's argument in this respect is that, as we explain below, the Supreme Court already has determined that COPA does not apply to foreign Web sites. But notwithstanding this significant

limitation on COPA's scope, if we had to pass on the issue we might conclude that COPA is not unconstitutionally underinclusive. The Supreme Court has explained the circumstances in which a court may find that a regulation of speech is impermissibly underinclusive:

> [A]n exemption from an otherwise permissible regulation of speech may represent a governmental 'attempt to give one side of a debatable public question an advantage in expressing its views to the people.' *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86, 98 S. Ct. 1407, 1420-21, 55 L. Ed. 2d 707 (1978). Alternatively, through the combined operation of a general speech restriction and its exemptions, the government might seek to select the 'permissible subjects for public debate' and thereby to 'control . . . the search for political truth.' *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 538, 100 S. Ct. 2326, 2333, 65 L. Ed. 2d 319 (1980).

City of Ladue v. Gilleo, 512 U.S. 43, 51, 114 S. Ct. 2038, 2043 (1994) (second alteration in original) (footnote omitted). These quite narrow circumstances are hardly applicable to COPA. Even though, as the District Court recognized, COPA does not apply to foreign Web sites, we cannot understand how that limitation on its scope would "represent a governmental attempt to give one side of a debatable public question an advantage in expressing its views to the people . . . [or] to select the permissible subjects for public debate." *Id.* (citations and quotation marks omitted). There is no evidence in the record of which we are aware that Congress sought to favor foreign Web site publishers over domestic Web site publishers when regulating sexually explicit mate-

rial on the Web, nor is there any suggestion in the record that the Government is selecting the permissible subject for public debate by excluding foreign Web sites from COPA's coverage.

In fact, we think that it is likely that Congress would have desired to place COPA's restrictions on foreign Web sites available for access in this country but chose not to do so because, as the District Court recognized:

> [e]nforcement of COPA against overseas Web site owners would . . . be burdensome and impractical due to the knotty questions of jurisdiction which arise in the Internet context. Furthermore, even if a specific foreign Web site had sufficient contacts with the forum to allow personal jurisdiction, it could be quite difficult or impossible to ensure that the offender would obey or could be forced to obey the judgment of the U.S. court.

Gonzales, 478 F. Supp. 2d at 811. In these circumstances, even though COPA's omission of foreign Web sites from its regulations certainly is relevant in an inquiry into whether it is the most effective means of advancing the Government's compelling interest in COPA's object, the omission might not lead us to a conclusion that the statute is impermissibly underinclusive. After all, as the Court of Appeals for the Eighth Circuit recently noted, "a limitation on speech that is not all-encompassing may still be narrowly tailored where the underinclusivity does not favor a particular viewpoint or undermine the rationale given for the regulation." *Bowman v. White*, 444 F.3d 967, 983 (8th Cir. 2006).

On the other hand, we might conclude that because COPA fails to apply to 50% of its purported commercial

pornography targets, we lack the evidence necessary to satisfy us that Congress had in mind its stated goal of protecting minors from harmful material on the Web when it passed COPA. It is not as though Congress is unable to protect minors from harmful material on foreign Web sites; for instance, Congress could promote the use of Internet content filters, which do not discriminate on the basis of geography. COPA's failure to protect minors from harmful material on foreign Web sites might raise the inference that Congress had some ulterior, impermissible motive for passing COPA.

We note, however, that our possible disagreement with the District Court on this one point would not change our ultimate decision to affirm its order granting a permanent injunction, as there are numerous other grounds that require us to find that COPA is not narrowly tailored and is unconstitutional. Accordingly, we will refrain from deciding the matter.

The District Court also found that COPA's affirmative defenses "do not aid in narrowly tailoring COPA to Congress' compelling interest." *Gonzales*, 478 F. Supp. 2d at 813. Specifically, the court found that:

> there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor.

Id. at 800. The court found that "[t]he rules of payment card associations in this country prohibit Web sites from claiming that use of a payment card is an effective method of verifying age, and prohibit Web site owners

from using credit or debit cards to verify age," and that "a significant number of minors have access to [payment cards]." *Id.* at 801. The court also reviewed data verification services, which are "non-payment card-based services that attempt to verify the age or identity of an individual Internet user," and found that they are unreliable because they "cannot determine whether the person entering information into the Web site is the person to whom the information pertains." *Id.* at 802. The court further found that the minimum information required by a data verification services company "can easily be circumvented by children who generally know the first and last name, street address and zip codes of their parents or another adult." *Id.*

The court later explained, "[t]he affirmative defenses cannot cure COPA's failure to be narrowly tailored because they are effectively unavailable. Credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age. As a result, their use does not, in good faith, 'restrict [] access' by minors." *Id.* at 811 (second alteration in original) (quoting 47 U.S.C. § 231(c)(1)(A)).

The court also concluded that COPA's affirmative defenses "raise unique First Amendment issues" that make the statute unconstitutional. *Id.* at 813. The court found that due to the fees associated with the use of the procedures enumerated in all of the affirmative defenses and verification services, "Web sites . . . which desire to provide free distribution of their information, will be prevented from doing so." *Id.* at 804. The court also found that:

> [f]or a plethora of reasons including privacy and financial concerns . . . and the fact that so much Web content is available for free, many Web users already refuse to register, provide credit card information, or provide real personal information to Web sites if they have any alternative. Because requiring age verification would lead to a significant loss of users, content providers would have to either self-censor, risk prosecution, or shoulder the large financial burden of age verification.

Id. at 805. Moreover, the court found that "many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners . . . will be deprived of the ability to provide this information to those users." *Id.* at 806. The court also indicated that:

> [r]equiring Internet users to provide payment card information or other personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet.

Id. Based on these findings, the court concluded that:

> [t]he affirmative defenses also raise their own First Amendment concerns. For example, the utilization of those devices to trigger COPA's affirmative defenses will deter listeners, many of whom will be unwilling to reveal personal and financial information in order to access content and, thus, will chill speech. Similarly, the affirmative defenses also impermissibly burden Web site operators with demon-

> strating that their speech is lawful. Under the COPA regime, Web site operators are unable to defend themselves until after they are prosecuted. Moreover, the affirmative defenses place substantial economic burdens on the exercise of protected speech because all of them involve significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free.

Id. at 812-13 (citations and quotations omitted).

The Government argues that the District Court erred in rejecting the limiting effect of COPA's affirmative defenses. It contends that "[t]he possibility that some minors may have access to credit cards merely demonstrates that no system of age verification is foolproof. It does not call into question the availability of credit card screening as an affirmative defense that tailors COPA more narrowly." Appellant's Br. at 37. The Government also argues that "the court ignored testimony that minors do *not* have access to traditional payment cards under their own control but simply have access to cards supervised by adults." *Id.*

But the District Court found that even if there is parental supervision of payment card use, the supervision does not prevent access to harmful material by minors because parents "may not be able to identify transactions on sexually explicit Web sites because the adult nature of such transactions is often not readily identifiable . . . ." *Gonzales*, 478 F. Supp. 2d at 802. In any event, we conclude that the District Court correctly found that the affirmative defenses are "effectively unavailable" because they do not actually verify age.

The Government also argues that the District Court incorrectly determined that the affirmative defenses present their own First Amendment concerns by imposing undue burdens on Web publishers due to the high costs of implementing age verification technologies and the loss of traffic that would result from the use of these technologies. The Government contends that the:

> court's evaluation of the burdens imposed by COPA was flawed because the court focused largely, if not exclusively, on Web publishers who provide their content for free. Whatever limited application COPA might have beyond its core regulation of commercial pornography, the court erred in evaluating the burdens the statute imposes based *entirely* on these marginal cases and ignoring the heartland of the statute's proscriptions, where the burdens are far less onerous.

Appellant's Br. at 38-39 (citations and quotations omitted). We reject this argument. The fact that COPA places burdens on Web publishers whom the Government does not consider to be within the "heartland" of the statute does not make those burdens any less onerous or offensive to the principles of the First Amendment.

Moreover, there is good reason to believe that COPA unduly would burden even those Web publishers whom the Government considers to fall within the "heartland" of the statute, because the District Court found that those publishers also will face significant costs to implement the affirmative defenses and will suffer the loss of legitimate visitors once they do so. And, contrary to the Government's suggestion at oral argument, users would

have alternatives to obtain pornography even if COPA was in effect because, as we already have indicated and discuss below, COPA does not apply to foreign Web sites. The loss of traffic that would result clearly is an undue burden on even those Web sites that the Government contends are in the "heartland" of COPA.

We conclude that the District Court correctly found that implementation of COPA's affirmative defenses by a Web publisher so as to avoid prosecution would involve high costs and also would deter users from visiting implicated Web sites. It is clear that these burdens would chill protected speech and thus that the affirmative defenses fail a strict scrutiny analysis.

The Government contends that nevertheless these burdens "are no different in kind or degree from the burdens imposed by state laws regulating the sale and commercial display of 'harmful to minors' materials. . . . [T]he effect of the statute is simply to requir[e] the commercial pornographer to put sexually explicit images behind the counter." Appellant's Br. at 43 (citations and certain internal quotation marks omitted) (second alteration in original).

We rejected this argument in *ACLU II*. *See* 322 F.3d at 260 ("Blinder racks do not require adults to compromise their anonymity in their viewing of material harmful to minors, nor do they create any financial burden on the user. Moreover, they do not burden the speech contained in the targeted publications any more than is absolutely necessary to shield minors from its content."). Blinder racks do not require adults to pay for speech that otherwise would be accessible for free, they do not require adults to relinquish their anonymity to access

protected speech, and they do not create a potentially permanent electronic record. Blinder racks simply do not involve the privacy and security concerns that COPA's affirmative defenses raise, and so the Government's attempted analogy is ill-fitting.

In sum, after considering our previous conclusions in *ACLU II* and our analyses of the issues *ACLU II* has not resolved, we are quite certain that notwithstanding Congress's laudable purpose in enacting COPA, the Government has not met its burden of showing that it is narrowly tailored so as to survive a strict scrutiny analysis and thereby permit us to hold it to be constitutional.

3. Least Restrictive Alternative

In addition to failing the strict scrutiny test because it is not narrowly tailored, COPA does not employ the least restrictive alternative to advance the Government's compelling interest in its purpose, the third prong of the three-prong strict scrutiny test. "A statute that 'effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.'" *Ashcroft*, 542 U.S. at 665, 124 S. Ct. at 2791 (alteration in original) (quoting *Reno*, 521 U.S. at 874, 117 S. Ct. at 2346). "[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Id.* (citing *Reno*, 521 U.S. at 874, 117 S. Ct. at 2346). The Government's burden is "not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show

that it is less effective." *Id.* at 669, 124 S. Ct. at 2793 (citing *Reno*, 521 U.S. at 874, 117 S. Ct. at 2346).

Based on the preliminary injunction record in this case, the Supreme Court held that "[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." *Id.* at 666-67, 124 S. Ct. at 2792. We reached a similar conclusion in *ACLU II*. *See* 322 F.3d at 265.[3]

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[3] Our opinion in *ACLU II* is not entirely clear on this point. We started our discussion of the least restrictive alternative question by indicating that "[w]e are also satisfied that COPA does not employ the 'least restrictive means' to effect the Government's compelling interest in protecting minors." *ACLU II*, 322 F.3d at 261. Then in considering that question in more detail we discussed filters at length. At one point in the opinion we stated that "filtering software is a less restrictive alternative that can allow parents some measure of control over their children's access to speech that parents consider inappropriate." *Id.* at 263. At several other points, we also stated that COPA is not the least restrictive alternative. *See id.* at 261 ("We are . . . satisfied that COPA does not employ the 'least restrictive means' to effect the Government's compelling interest in protecting minors."); *id.* at 265-66 ("The existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny. . . . COPA also fails strict scrutiny because it does not use the least restrictive means to achieve its ends. . . . Congress could have, but failed to employ the least restrictive means to accomplish its legitimate goal . . . ."). Nevertheless we stated that "[w]e agree with the District Court that the various blocking and filtering techniques which that Court discussed *may* be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's access to harmful material." *Id.* at 265 (emphasis added). Because of this statement, we cannot state with certainty that *ACLU II* squarely holds that filters are less restrictive than COPA, though it probably does. Thus, for law-of-the-case purposes, we might not consider ourselves bound on this appeal by that determination. Of course, this discussion of whether we determined that filters are less restrictive than COPA or that filters only may be less restrictive than

After the trial on the merits, the District Court concluded that the Government did not meet its burden of showing that COPA is the least restrictive effective alternative for advancing Congress's compelling interest because filter software and the Government's promotion and support of filter software is a less restrictive effective alternative to COPA.

The District Court discussed Internet content filters at length in its Findings of Fact. We will review these findings in detail, as the need to determine whether filters are more effective than COPA to effectuate Congress's purpose in enacting that statute was the primary reason the Supreme Court remanded the case. According to the District Court:

> Internet content filters ('filters') are computer applications which, *inter alia*, attempt to block certain categories of material from view that a Web browser or other Internet application is capable of displaying or downloading, including sexually explicit material. Filters categorize and block Web sites or pages based on their content. By classifying a site or page, and refusing to display it on the user's computer screen, filters can be used to prevent children from seeing material that might be considered unsuitable.

Gonzales, 478 F. Supp. 2d at 789. The court explained:

COPA is somewhat academic, for on the appeal of *ACLU II* the Supreme Court explicitly addressed this issue and, though remanding the case, flatly indicated that filters are "less restrictive" than COPA, *Ashcroft*, 342 U.S. at 667, 124 S. Ct. at 2792, and that Court's conclusions supersede our decision in *ACLU II* on this point.

> Filters can be programmed or configured in a variety of different ways according to, *inter alia*, the values of the parents using them and the age and maturity of their children. . . . [F]ilters can be set up to restrict materials available on Web pages and other Internet applications based on numerous factors including the type of content they contain, the presence of particular words, the address of the Web site, the Internet protocol used, or computer application used. Some filters can also restrict Internet access based on time of day, day of week, how long the computer has been connected to the Internet, or which user is logged onto a computer.

Id. at 790. The court then described in detail how filters operate:

> Filters use different mechanisms to attempt to block access to material on the Internet including: black lists, white lists, and dynamic filtering. Black lists are lists of URLs or Internet Protocol ('IP') addresses that a filtering company has determined lead to content that contains the type of materials its filter is designed to block. White lists are lists of URLs or IP addresses that a filtering company has determined do not lead to any content its filter is designed to block, and, thus, should never be blocked. . . . In addition to its own black and white lists, filters often give parents or administrators the option of creating customized black or white lists. Dynamic filtering products use artificial intelligence to analyze Web site content in real-time as it is being requested and determine whether it should be blocked by evaluating a number of different parts of the content, both what the user can actually see on

> the Web page, and the various hidden pieces of information contained with the content that are part of its software code or script, known as the 'metadata.' Among other things, dynamic filters analyze the words on the page, the metadata, the file names for images, the URLs, the links on a page, the size of images, the formatting of the page, and other statistical pattern recognition features, such as the spatial patterns between certain words and images, which can often help filters categorize content even if the actual words are not recognized. In addition to analyzing the content of Web pages, dynamic filters also take the context of the page into consideration, to ensure that the determinations are as accurate as possible. For example, many companies will develop templates that provide additional context to teach the software how to recognize certain contexts-for example, to block the word 'breast' when used in combination with the word 'sexy,' but not when used in combination with the words 'chicken' or 'cancer.' The software analyzes context, in part, by utilizing statistical pattern recognition techniques to identify common features of acceptable and unacceptable Web pages, depending on the context in which the content appears.

Id. at 790-91 (citations omitted). The court found that:

> [f]ilters can be used by parents to block material that is distributed on the Web and on the other widely used parts of the Internet through protocols other than HTTP and through other Internet applications. For example, filters can be used to block any Internet application, including email, chat, instant messaging, peer-to-peer file sharing, newsgroups,

> streaming video and audio, Internet television and voice over Internet protocol ('VoIP'), and other Internet protocols such as FTP. In addition to blocking access to these Internet applications completely, some products provide parents with the option of providing limited access to these applications. For example, instant messaging and email may be permitted, but some of the filtering products will only permit the sending and receiving of messages from certain authorized individuals, and will block e-mails or instant messages containing inappropriate words or any images. Filtering programs can also completely prevent children from entering or using chat rooms, or some can merely filter out any inappropriate words that come up during a chat session.

Id. at 791 (citations omitted). The court then described the flexible nature of filters:

> Some filtering programs offer only a small number of settings, while others are highly customizable, allowing a parent to make detailed decisions about what to allow and what to block. Filtering products do this by, among other things, enabling parents to choose which categories of speech they want to be blocked (such as sexually explicit material, illicit drug information, information on violence and weapons, and hate speech) and which age setting they want the product to apply. . . . Filtering products can be used by parents even if they have more than one child. For example, if a family has four children, many filtering products will enable the parent to set up different accounts for each child, to ensure that each child is able to access only the content that the parents want that particular child to access.

Id. (citations omitted). The court found that:

> [f]iltering products block both Web pages originating from within the United States and Web pages originating from outside the United States. The geographic origin of a Web page is not a factor in how a filter works because the filter analyzes the content of the Web page, not the location from which it came.

Id. at 791-92. The court found that "[f]iltering products block both non-commercial and commercial Web pages." *Id.* at 792. The court also found that:

> [i]n addition to their content filtering features, filtering products have a number of additional tools to help parents control their children's Internet activities. Other tools available to parents include monitoring and reporting features that allow supervising adults to know which sites a minor has visited and what other types of activities a minor has engaged in online.

Id.

The District Court found that "[f]ilters are widely available and easy to obtain," and that "[f]iltering programs are fairly easy to install, configure, and use and require only minimal effort by the end user to configure and update." *Id.* at 793. The court found that "[i]nstalling and setting up a filter will usually take a typical computer user no more than ten or fifteen minutes. The installation and set-up process is not technically complex and does not require any special training or knowledge." *Id.* at 794. The court then considered the evidence regarding the effectiveness of filters. It found that:

> [f]iltering products have improved over time and are now more effective than ever before. This is because, as with all software, the filtering companies have addressed problems with the earlier versions of the products in an attempt to make their products better. Another reason the effectiveness of filtering products has improved is that many products now provide multiple layers of filtering. Whereas many filters once only relied on black lists or white lists, many of today's products utilize black lists, white lists, and real-time, dynamic filtering to catch any inappropriate sites that have not previously been classified by the product. There is a high level of competition in the field of Internet content filtering. That factor, along with the development of new technologies, has also caused the products to improve over time.

Id. at 794-95 (citations omitted).

The District Court then found that:

> [o]ne of the features of filtering programs that adds to their effectiveness is that they have built-in mechanisms to prevent children from bypassing or circumventing the filters, including password protection and other devices to prevent children from uninstalling the product or changing the settings. Some products even have a tamper detection feature, by which they can detect when someone is trying to uninstall or disable the product, and then cut off Internet access altogether until it has been properly reconfigured. Filtering companies actively take steps to make sure that children are not able to come up with ways to circumvent their filters. Filtering

> companies monitor the Web to identify any methods for circumventing filters, and when such methods are found, the filtering companies respond by putting in extra protections in an attempt to make sure that those methods do not succeed with their products.

Id. at 795 (citations omitted). The court also found that "[i]t is difficult for children to circumvent filters because of the technical ability and expertise necessary to do so . . . ." *Id.* Finally, the court found that "filters generally block about 95% of sexually explicit material." *Id.*

After describing filtering technology, the District Court concluded that the Government "failed to successfully defend against the plaintiffs' assertion that filter software and the Government's promotion and support thereof is a less restrictive alternative to COPA." *Id.* at 813. The court reasoned that "unlike COPA there are no fines or prison sentences associated with filters which would chill speech. Also unlike COPA, . . . filters are fully customizable and may be set for different ages and for different categories of speech or may be disabled altogether for adult use. As a result, filters are less restrictive than COPA." *Id.* (citations omitted).

The District Court also concluded that the Government "failed to show that filters are not at least as effective as COPA at protecting minors from harmful material on the Web." *Id.* at 814. The court determined that COPA will not reach sexually explicit materials on the Web that originate from foreign sources, its affirmative defenses are not effective, and it is unlikely that COPA will be enforced widely. The court found that:

> filters block sexually explicit foreign material on the Web, parents can customize filter settings depending

> on the ages of their children and what type of content they find objectionable, and filters are fairly easy to install and use. . . . [F]ilters are very effective at blocking potentially harmful sexually explicit materials.

Id. at 815 (citations omitted). The court concluded that "[e]ven defendant's own study shows that all but the worst performing filters are far more effective than COPA would be at protecting children from sexually explicit material on the Web . . . ." *Id.*

The Government does not challenge the District Court's factual findings and therefore we need not set forth the evidence on which the court based its findings. The Government does contend, however, that the District Court erred in concluding that filters are a less restrictive alternative because the court applied a "flawed analytical framework" and that filters cannot be considered a less restrictive alternative because they are part of the "status quo." Appellant's Br. at 43-44.

But the Supreme Court's statement on this issue contravenes the Government's argument:

> In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal . . . . The purpose of the test is to ensure that the speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate in-

> terest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Ashcroft, 542 U.S. at 666, 124 S. Ct. at 2791. This reasoning explains why the Court then instructed the parties to update the factual record regarding "the effectiveness of filtering software" so that the District Court could determine whether "filters are less effective than COPA." *Id.* at 671, 124 S. Ct. at 2794. Accordingly, the Government is incorrect in its assertion that the District Court applied an erroneous analytical framework.

We agree with the District Court's conclusion that filters and the Government's promotion of filters are more effective than COPA. The Supreme Court already has written how the Government could act to promote and support the use of filters:

> Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. It could also take steps to promote their development by industry, and their use by parents. It is incorrect, for that reason, to say that filters are part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. In enacting COPA, Congress said its goal was to prevent the 'widespread availability of the Internet' from providing 'opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control.'

> COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.

Id. at 669-70, 124 S. Ct. at 2793 (citations omitted).

As the District Court pointed out, filters can be used to block foreign Web sites, which COPA does not regulate. Though the Government contends that COPA applies to foreign Web sites, the Supreme Court already has rejected the Government's construction of the statute. In *Ashcroft* the Court stated that:

> a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. . . . COPA does not prevent minors from having access to those foreign harmful materials. . . . [I]f COPA is upheld, . . . providers of the materials that would be covered by the statute simply can move their operations overseas.

Id. at 667, 124 S. Ct. at 2792. In light of the Supreme Court's express conclusion that COPA does not apply to foreign Web sites—a determination that does not depend upon the facts developed at the later trial in the District Court—we cannot construe COPA to apply to foreign Web sites.

Given the vast quantity of speech that COPA does not cover but that filters do cover, it is apparent that filters are more effective in advancing Congress's interest, as it made plain it is in COPA. Moreover, filters are more flexible than COPA because parents can tailor them to their own values and needs and to the age and

maturity of their children and thus use an appropriate flexible approach differing from COPA's "one size fits all" approach. Finally, the evidence makes clear that, although not flawless, with proper use filters are highly effective in preventing minors from accessing sexually explicit material on the Web.

At oral argument, the Government made much of a study that found that only 54 percent of parents use filters. But the Government has neglected the fact that this figure represents a 65 percent increase from a prior study done four years earlier, which indicates that significantly more families are using filters. App. at 159-60. Furthermore, the circumstance that some parents choose not to use filters does not mean that filters are not an effective alternative to COPA. Though we recognize that some of those parents may be indifferent to what their children see, others may have decided to use other methods to protect their children—such as by placing the family computer in the living room, instead of their children's bedroom—or trust that their children will voluntarily avoid harmful material on the Internet. Studies have shown that the primary reason that parents do not use filters is that they think they are unnecessary because they trust their children and do not see a need to block content. *Id.* at 160, 164, 278, 1567. The Government simply has not carried its burden of showing that COPA is a more effective method than filters in advancing the Government's compelling interest as evidenced in COPA.

In addition to being more effective, it is clear that filters are less restrictive than COPA. As the Supreme Court has stated:

> [f]ilters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Ashcroft, 542 U.S. at 667, 124 S. Ct. at 2792. Although the Supreme Court made this statement after reviewing the record from the hearing on the preliminary injunction, the evidence produced at the trial on the merits confirms the Court's initial impression. Unlike COPA, filters permit adults to determine if and when they want to use them and do not subject speakers to criminal or civil penalties.

During oral argument, the Government contended that the First Amendment does not prohibit Congress from adopting a "belt-and-suspenders" approach to addressing the compelling government interest of protecting minors from accessing harmful material on the Web, with filters acting as the "belt" and COPA as the "suspenders." But as counsel for plaintiffs correctly pointed out, under the First Amendment, if the belt works at least as effectively as the suspenders, then the Government cannot prosecute people for not wearing suspend-

ers. Here, based on the prior litigation in the Supreme Court and this Court in *ACLU II* and the District Court's findings on the remand, the Government has not shown that COPA is a more effective and less restrictive alternative to the use of filters and the Government's promotion of them in effectuating COPA's purposes. Indeed, we would reach this conclusion on the basis of either the prior litigation or the District Court's findings on the remand. Accordingly, COPA fails the third prong of a strict scrutiny analysis and is unconstitutional.

C. Vagueness and Overbreadth

The Government also challenges the District Court's decision that COPA facially violates the First and Fifth Amendments because it is impermissibly vague and overbroad.

1. Vagueness

The Supreme Court recently described the vagueness doctrine:

> Vagueness doctrine is an outgrowth not of the First Amendment, but of the Due Process Clause of the Fifth Amendment. A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement. Although ordinarily a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others, we have relaxed that requirement in the First Amendment context, permitting plaintiffs to argue that a statute is

> overbroad because it is unclear whether it regulates a substantial amount of protected speech. But perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.

Williams, 128 S. Ct. at 1845 (citations, quotation marks, and brackets omitted). The Court further explained:

> What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is. Thus, we have struck down statutes that tied criminal culpability to whether the defendant's conduct was 'annoying' or 'indecent'—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.

Id. at 1846.

Our discussion in *ACLU II* of the question of whether COPA is impermissibly vague was quite limited but in a footnote we stated that we considered COPA's use of the term "minor" as incorporated in COPA's definition of "material that is harmful to minors" to be impermissibly vague. We reached this conclusion because we believed that "a Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies," and thus will not have "fair notice of what conduct would subject them to criminal sanctions under COPA" and "will be deterred from engaging in a wide range of constitutionally protected speech." 322 F.3d at 268 n.37.

The District Court on the remand concluded that COPA is vague for several reasons. First, the court pointed out that COPA utilizes two different scienter requirements—"knowingly" and "intentionally"—but does not define either standard. *Gonzales*, 478 F. Supp. 2d at 816-17. Second, the court determined that although Congress intended COPA to apply solely to commercial pornographers, the phrase "communication for commercial purposes" as modified by the phrase "engaged in the business" does not limit COPA's application to commercial pornographers. *Id.* at 817. Thus, Web publishers that are not commercial pornographers will be uncertain as to whether they will face prosecution under the statute, chilling their speech. *Id.* Third, the court found that the definition of "minor" as any person under 17 years of age creates vagueness in COPA because materials that could have "serious literary, artistic, political, or scientific value" for a 16-year-old would not necessarily have the same value for a three-year-old. *Id.* Thus, Web publishers cannot tell which of these minors should be considered in deciding the content of their Web sites. *Id.* at 817-18. Fourth, the court stated that COPA's use of the phrase "as a whole" is vague because it is unclear how that phrase would apply to the Web. *Id.* at 818.

The Government contends that the District Court erred in finding COPA impermissibly vague and argues that the statutory provisions that the District Court concluded rendered the statute vague instead served to limit the reach of the statute.

We are bound by our conclusion in *ACLU II* that COPA's definition of "minor" renders the statute vague. Furthermore we agree with the District Court's conclu-

sion that COPA's use of the phrases and terms "communication for commercial purposes," "as a whole," "intentional," and "knowing" renders it vague, for the reasons the District Court stated in its opinion.

2. Overbreadth

The Supreme Court also addressed the First Amendment overbreadth doctrine in *Williams*, stating that:

> [A] statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional—particularly a law directed at conduct so antisocial that it has been made criminal—has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is strong medicine that is not to be casually employed.

128 S. Ct. at 1838 (citations and quotation marks omitted).

In *ACLU II* we held that COPA is "substantially overbroad" because:

> it places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such

> speech. In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors.

322 F.3d at 266-67. We found that COPA's definition of "material harmful to minors" "impermissibly places at risk a wide spectrum of speech that is constitutionally protected" because it "calls for evaluation of 'any material' on the Web *in isolation*." *Id.* at 267. Thus, we explained:

> an isolated item located somewhere on a Web site that meets the 'harmful to minors' definition can subject the publisher of the site to liability under COPA, even though the entire Web page (or Web site) that provides the context for the item would be constitutionally protected for adults (and indeed, may be protected as to minors).

Id. We also found that COPA's definition of "minors" renders the statute overinclusive because it "broadens the reach of 'material that is harmful to minors' under the statute to encompass a vast array of speech that is clearly protected for adults—and indeed, may not be obscene as to older minors . . . ." *Id.* at 268. We next found that COPA's definition of "commercial purposes" rendered the statute overbroad for the same reasons that it failed strict scrutiny. *Id.* at 269.

We also found that "COPA's application of 'community standards' exacerbates these constitutional problems in that it further widens the spectrum of protected speech that COPA affects." *Id.* at 270. We stated that "COPA essentially requires that every Web publisher

subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability." *Id.* (quoting *ACLU I*, 217 F.3d at 166). Finally, we found that there was no available narrowing construction that would make COPA constitutional. *Id.* at 270-71. These conclusions bind us here.

The District Court also found that COPA is overbroad for several reasons. First, the court determined that the vagueness of the phrases "communication for commercial purposes" and "engaged in the business" means that COPA could apply to a wide swath of the Web and thus COPA would prohibit and chill a substantial amount of constitutionally protected speech for adults. *Gonzales*, 478 F. Supp. 2d at 819. Second, because the definition of "minor" includes any person under 17, Web publishers do not have fair notice regarding what they can place on the Web that will not be considered harmful to any minor. *Id.* Thus, the definition of "minor" renders COPA overinclusive because it broadens the statute to encompass a large array of protected speech. *Id.* Finally, the court found that because the statute does not reference commercial pornographers, it found that it could not read such a limitation into the statute to save it from being overbroad. *Id.* at 819-20.

The Government claims that COPA is not overbroad, but it is clear that our prior decision in *ACLU II* binds us on this issue. It is apparent that COPA, like the Communications Decency Act before it, "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another," *Reno*, 521 U.S. at 874, 117 S. Ct. at 2346, and thus is overbroad. For this reason, COPA violates the First Amendment.

V. CONCLUSION

In sum, COPA cannot withstand a strict scrutiny, vagueness, or overbreadth analysis and thus is unconstitutional. We reach our result both through the application of the law-of-the-case doctrine to our determination in *ACLU II* and on the basis of our independent analysis of COPA and would reach the same result on either basis standing alone. For the foregoing reasons, we will affirm the District Court's March 22, 2007 order.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2539
D.C. Civ. No. 98-05591

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC., D/B/A A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., D/B/A CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.; PLANETOUT, INC.; HEATHER CORINNA REARICK; NERVE.COM, INC.; AARON PECKHAM, D/B/A URBAN DICTIONARY; PUBLIC COMMUNICATORS, INC.; DAN SAVAGE; SEXUAL HEALTH NETWORK

v.

*MICHAEL B. MUKASEY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES

MICHAEL B. MUKASEY, APPELLANT

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

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* Substituted as per FRAP 43(b).

SUR PETITION FOR REHEARING

Before: SCIRICA, *Chief Judge*, and SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and GREENBERG, *Circuit Judges*

The petition for rehearing filed by appellant, Michael B. Mukasey, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Greenberg's vote is limited to denying rehearing before the original panel.

BY THE COURT:

/s/ MORTON I. GREENBERG
MORTON I. GREENBERG
Circuit Judge

DATED: 16 Sept. 2008

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

ALBERTO R. GONZALES IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES

FINAL ADJUDICATION

Mar. 22, 2007

LOWELL A. REED, JR., SR. J.

At issue in this case is the constitutionality of the Child Online Protection Act, 47 U.S.C. § 231 ("COPA") and whether this court should issue a permanent injunction against its enforcement due to its alleged constitutional infirmities. COPA provides both criminal and civil penalties for transmitting sexually explicit materials and communications over the World Wide Web ("Web") which are available to minors and harmful to them. 47 U.S.C. § 231(a). After a trial on the merits, for the reasons that follow, notwithstanding the compelling interest of Congress in protecting children from sexually explicit material on the Web, I conclude today that COPA facially violates the First and Fifth Amendment rights of

the plaintiffs because: (1) at least some of the plaintiffs have standing; (2) COPA is not narrowly tailored to Congress' compelling interest; (3) defendant has failed to meet his burden of showing that COPA is the least restrictive, most effective alternative in achieving the compelling interest; and (3) COPA is impermissibly vague and overbroad. As a result, I will issue a permanent injunction against the enforcement of COPA.

[Table of contents omitted]

I. PROCEDURAL HISTORY

The plaintiffs in this action, which include both the individual and institutional plaintiffs listed below, have challenged the constitutionality of COPA under the First and Fifth Amendments. COPA, which was designed to protect minors from exposure to sexually explicit materials on the Web deemed harmful to them, was signed into law on October 21, 1998. COPA is the second attempt by Congress to protect children from such material. The first attempt was the Communications Decency Act of 1996, 47 U.S.C. § 223 ("the CDA") which the Supreme Court held was unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. *See Ashcroft v. ACLU*, 542 U.S. 656, 661 (2004) (discussing *Reno v. ALCU*, 521 U.S. 844 (1997)). COPA was designed to directly address the faults that the Supreme Court found with the CDA. The day after COPA was signed, the plaintiffs filed this suit seeking injunctive relief from its enforcement. On February 1, 1999, after having previously granted the plaintiffs' motion for a temporary restraining order, this court granted the plaintiffs' motion for a preliminary injunction. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa.

1999). After an interim trip to the Supreme Court (*see Ashcroft v. ACLU*, 535 U.S. 564 (2002))[1], this court's decision granting the preliminary injunction was finally affirmed by the Supreme Court on June 29, 2004, and remanded to this court for a trial on the merits in order to, *inter alia*, update the factual record to reflect current technological developments, account for any changes in the legal landscape, and to determine whether Internet content filters are more effective than COPA or whether other possible alternatives are less restrictive and more effective than COPA. *Ashcroft*, 542 U.S. at 671-673. For a more detailed description of the history and background of this case, see the Supreme Court's opinion. *Id.* at 663-664. This court held a trial on the merits of the within action, beginning on October 23, 2006 and concluding on November 20, 2006.

II. THE RELEVANT LANGUAGE OF COPA AND THE CONSTITUTION

COPA provides that:

> Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

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[1] The Court of Appeals for the Third Circuit twice reviewed the efficacy of the preliminary injunction, once on direct appeal (*ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000)) and once upon remand from the Supreme Court (*ACLU v. Ashcroft*, 322 F.3d 240 (3d Cir. 2003)), each time affirming the decision of this court.

47 U.S.C. § 231(a)(1). There is an additional monetary penalty for intentional violations of the above quoted language and a provision for additional civil penalties. 47 U.S.C. § 231(a)(2) & (3).

The crux of the statute is found in the definition of "harmful to minors" which tracks the familiar *Miller* obscenity standard. *See Miller v. California*, 413 U.S. 15, 24 (1973). Specifically, "material that is harmful to minors", means:

> any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). A minor is defined as "any person under 17 years of age." 47 U.S.C. § 231(e)(7).

"[B]y means of the World Wide Web" is defined as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol [("HTTP")]

or any successor protocol." 47 U.S.C. § 231(e)(1). Under COPA, the Internet "means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information." 47 U.S.C. § 231(e)(3).

Another important feature of COPA for the purposes of this action is that "[a] person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communication." 47 U.S.C. § 231(e)(2)(a). Moreover, "engaged in the business" means that:

> the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

47 U.S.C. § 231(e)(2)(b).

Although COPA brands all speech falling within its reach as criminal speech, it also provides an affirmative defense against liability if:

> the defendant, in good faith, has restricted access by minors to material that is harmful to minors-
>
> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).

Moreover, those exempt from liability include telecommunications carriers, Internet access service providers, those engaged in the business of providing an Internet information location tool, or those:

> similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) of this section or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

47 U.S.C. § 231(b).

The First Amendment to the Constitution of the United States provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. Amend. I.[2]

III. FINDINGS OF FACT[3]

Having presided at the trial, having seen and heard the testimony of the parties' representatives and other witnesses, and having reviewed the other evidence received, I find that, unless otherwise noted, the facts set forth in the parties' Joint Exhibit 1, and the testimony of the witnesses as well as the evidence excerpted and referenced in these Findings of Fact are true, reliable, and credible and I accept those facts and that testimony as the foundation of the following Findings of Fact and Conclusions of Law.

A. The Internet

1. The Internet is an interactive medium based on a decentralized network of computers. One portion of the Internet is known as the World Wide Web ("Web"). The Internet may also be used to engage in other activities such as sending and receiving emails, trading files, exchanging instant messages, chatting online, streaming audio and video, and making voice calls. Joint Exhibit ("J. Ex.") 1 ¶¶ 78-79, 94.

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[2] The plaintiffs also rely upon the Fifth Amendment to the Constitution which is the due process vehicle by which this action arrives in federal court.

[3] To the extent that the following Findings of Fact include Conclusions of Law or mixed Findings of Fact and Conclusions of Law, those Findings and Conclusions are hereby adopted by this court.

2. The results of the U.S. Census Bureau's Current Population Survey show that in September 2001, approximately 54 percent of the U.S. population was using the Internet from any location. That figure rose to 59 percent in 2003. *Id.* ¶ 97.

3. On the Web, a client program called a Web browser retrieves information from the Internet, such as Web pages and other computer files using their network addresses and displays them, typically on a computer monitor, using a markup language that determines the details of the display. One can then follow hyperlinks in each Web page to other resources on the Web of information whose location is provided by these hyperlinks. The act of following hyperlinks is frequently called "browsing" or "surfing" the Web. *Id.* ¶ 79.

4. Web pages, which can contain, *inter alia*, text, still and moving picture files, sound files, and computer scripts, are often arranged in collections of related material called Web sites, which consist of one or more Web pages. *Id.* ¶ 80.

5. Modern search engines search for and index Web pages individually. Search engines are Web sites that provide links to relevant Web pages, in response to search terms (words or phrases) entered by a user. They are a popular way of finding information online. *Id.* ¶ 83.

6. It is estimated that there are between 25 and 64 billion Web pages on the surface portion of the Web ("Surface Web")—that is, the portion of the Web that is capable of being indexed by search engines. Mewett Testimony, 11/7 Tr. 100:23-101:1; Def. Ex. 82, at 13. These Web pages may be displayed on a monitor screen and, thus, the content may be seen by anyone operating

a computer or other Internet capable device which is properly connected to the Internet. The court takes judicial notice of the fact that the computers relevant to this case are used throughout the modern world in, *inter alia*, homes, schools, hotels, businesses, public Internet cafes, and libraries and that portable computers and other Internet capable devices can be operated almost anywhere and have wide access to the Internet.

7. HTTP stands for hypertext transfer protocol which is widely used on the Internet. In fact, most Web site addresses ("URLs") use HTTP. J. Ex. 1 ¶¶ 111, 113.

8. FTP stands for file transfer protocol. It is used primarily to transfer files across the Internet. *Id.* ¶ 110.

B. The Parties

9. Defendant Alberto R. Gonzales is the Attorney General of the United States and is charged with enforcing the provisions of COPA challenged in this action. *Id.* ¶ 1. Attorney General Gonzales is sued here in his official capacity. Doc. No. 175, at 15.

10. The plaintiffs represent a range of individuals and entities including speakers, content providers, and ordinary users on the Web, as that term is defined in COPA. The plaintiffs post content on their Web sites including, *inter alia*, resources on sexual health, safer sex, and sexual education; visual art and poetry; resources for gays and lesbians; online magazines and articles; music; and books and information about books that are being offered for sale. J. Ex. 1 ¶ 2.

11. Some of the plaintiffs provide interactive fora on their Web sites, such as online discussion groups, bulletin boards and chat rooms, which enable users to

create their own material on the plaintiffs' Web sites. Some of the verbal and visual exchanges that could potentially occur in these chatrooms or in the postings on their bulletin boards may include language or images that contain sexually explicit content. *Id.* ¶ 3.

12. Plaintiff American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization which states that it is dedicated to defending the principles of the Bill of Rights. ACLU members Patricia Nell Warren ("Warren") and Lawrence Ferlinghetti ("Ferlinghetti") engage in speech on the Internet. *Id.* ¶ 4.

13. Plaintiff ACLU sues in part on behalf of its member Ferlinghetti, who is a writer and San Francisco's poet laureate. Ferlinghetti is the co-founder of City Lights Bookstore, which maintains a website "that promotes books available from the bookstore" and "contains lists of literary events and a brief history of City Lights Bookstore and Publishing," has a section describing Ferlinghetti's 1956 obscenity trial for selling the Allen Ginsberg poem *Howl*, and also has Ferlinghetti's poetry. *Id.* ¶ 5.

14. Plaintiff ACLU also sues in part on behalf of Warren, who is an author of novels, poetry, numerous articles, and essays. Her novels are alleged to be the most popular novels among classic gay literature. Warren is a co-owner of Wildcat International and its publishing arm, Wildcat Press. The Web site for Wildcat Press contains excerpts of her work, including "sexually explicit details such as the description of a 'foursome' [of people] erotically dancing and a description of two men passionately kissing." *Id.* ¶ 7.

15. Plaintiff Condomania is the nation's first condom store and a leading seller of condoms and distributor of safer sex materials. Condomania engages in speech on the Internet. *Id.* ¶ 8. Adam Glickman ("Glickman") is the CEO of Condomania. Glickman Testimony, 10/30 Tr. 91:18-20.

16. Plaintiff Heather Corinna ("Corinna") is a writer, artist, sex-educator, and activist whose primary presence on the Web consists of Scarletletters.com, Scarleteen.com, and Femmerotic.com, "each of which deals with issues of sex and sexuality with an explicit focus on challenging and combating the sexual oppression of traditionally marginalized groups." J. Ex. 1 ¶¶ 9-10.

17. Corinna operates the website Scarleteen.com. "Scarleteen is the Internet's largest independent, unaffiliated, free resource for young adult sex education, information, and discussion, serving nearly two million teens, young adults, parents, and educators each year." The Scarleteen Web site states that "[w]e offer Scarleteen as a far better resource for sex information for teens than adult sexuality sites, as well as a supplement to in-home and schoolbased sex education. Many parents we have heard from have used it as a tool to initiate discussion with their teens on some of the topics addressed. Homeschooling parents have used Scarleteen as curricula for sex education; colleges add our articles to their syllabi often." *Id.* ¶ 11.

18. "Femmerotic is Heather Corinna's personal Web site for showcasing her photographic and textual work and providing an 'open and intimate look at her life as an artist and activist.'" On this Web site, Corinna states that "[g]enerally, I intend to examine sexuality, to document sexual relationship[s], to explore the human

body and how I and viewers perceive it, to examine the female body and feelings about it, to explore my own identity and use all those aims to create work that creates questions." *Id.* ¶ 12.

19. Plaintiff Electronic Frontier Foundation ("EFF") sues in part on behalf of John W. "Bill" Boushka, who has work on the Web site www.doaskdotell.com. In the Amended Complaint, Mr. Boushka states that he fears prosecution for his book "Do Ask, Do Tell: A Gay Conservative Lashes Back," which he describes as "an exposé about gays in the military" that is a "politically-charged text" containing "subject-matter and language that might be deemed harmful to minors." *Id.* ¶ 13.

20. Plaintiff Free Speech Media, LLC in partnership with Public Communicators Inc., operates free-speech.org, which provides speech on the Internet and is "designed to encourage the democratic expression of progressive ideals through promoting, curating and hosting independent creators of audio and video content on the Web." Its video and audio files "cover a wide range of topics, including human rights, homelessness, labor issues, racism, prison conditions, sexuality, AIDS, feminism and environmentalism." *Id.* ¶¶ 15-16.

21. Plaintiff Nerve.com, Inc. ("Nerve") is an online magazine consisting of original fiction, personal essays, columns, photography, video, blogs, quizzes, polls, and crosswords. Griscom Testimony, 10/23 Tr. 61:15-62:5; Pl. Ex. 38. Nerve is run by Rufus Griscom ("Griscom"). J. Ex. 1 ¶ 17. According to Griscom, "Nerve is, in theory and hopefully in practice, a smart magazine about sex and culture." Griscom Testimony, 10/23 Tr. 52:13-14.

22. Plaintiff Aaron Peckham d/b/a Urban Dictionary operates an online dictionary of contemporary

slang "whose terms and definitions are solely user-generated and user-rated." J. Ex. 1 ¶¶ 18-19.

23. Plaintiff Philadelphia Gay News ("PGN"), is the "oldest gay newspaper in Philadelphia" and publishes both in print and online. The online and print editions "share much of the same content, including national and local news stories written by PGN correspondents, arts and events sections, regular columns, a calendar of events, and editorials on a variety of social and political topics." The online edition also contains personal and classified advertisements. *Id.* ¶¶ 20-21.

24. Plaintiff American Booksellers Foundation For Free Expression ("ABFFE") is a non-profit organization founded by the American Booksellers Association. Plaintiff Powell's Bookstore is a member of ABFFE. *Id.* ¶ 22.

25. Plaintiff Powell's Bookstore operates seven bookstores in Portland, Oregon and states that it is the "world's largest independent new and used bookstore." Powell's Bookstore also operates a website that "allows users to browse and purchase new, used, rare, and out-of-print books." *Id.* ¶ 23-24.

26. Plaintiff Salon Media Group, Inc. ("Salon") publishes an online magazine featuring articles on current events, the arts, politics, the media, and relationships and states that it "is a well-known, popular on-line magazine" that contains "news articles; commentaries on and reviews of music, art, television, and film; and regular columns on politics, relationships, the media, business, and other areas of interest." Salon also has music and video downloads and user-generated content. Salon's "goal is to break news as well as produce the most compelling sort of social commentary . . . on the web," and

it seeks to attract a "broad general interest audience" with its readership. Joan Walsh ("Walsh") is the Editor and Chief of Salon. *Id.* ¶¶ 2526; Walsh Testimony, 10/23 Tr. 107:17-18, 112:8-12.

27. Plaintiff Sexual Health Network owns and operates Sexualhealth.com which is "dedicated to providing easy access to sexuality information, education, support and other sexuality resources for everyone, including those with disability, chronic illness or other health-related problems." The Web site is run by Dr. Mitchell Tepper ("Dr. Tepper"). *Id.* ¶¶ 27-28

28. Plaintiff Electronic Privacy Information Center ("EPIC") "is a nonprofit educational organization established in 1994 to examine civil liberties and privacy issues arising on the Internet." EPIC alleges that it accesses information on the Internet, including sexually explicit pages, as part of its mission, which includes reporting on how well content filters work. *Id.* ¶ 29.

C. **The Experts**

1. Plaintiffs' Experts

29. Professor Lorrie Faith Cranor ("Dr. Cranor") is currently employed at Carnegie Mellon University as an associate research professor in the school of computer science. Cranor Testimony, 10/23 Tr. 201:25-202:4. Dr. Cranor was qualified in this case as an expert in the areas of Internet filtering products and other parental control tools used to control access to material on the Internet. Cranor Testimony, 10/23 Tr. 227:6-21.

30. Professor Edward William Felten ("Dr. Felten") is currently employed at Princeton University as a tenured professor of computer science and public affairs and director of the Center for Information Tech-

nology Policy. Felten Testimony, 10/24 Tr. 182:2-22. Dr. Felten was qualified in this case as an expert on the technology and use of Internet protocols, the technology and use of filtering products, and the technology and use of search engines. Felten Testimony, 10/24 Tr. 186:25-187:16.

31. Professor Matthew Alan Zook ("Dr. Zook") is currently employed at the University of Kentucky as an assistant professor of geography. Zook Testimony, 10/26 Tr. 53:12-19. Dr. Zook was qualified in this case as an expert in the area of Internet geography, which entails finding the locations of people using the Internet. Zook Testimony, 10/26 Tr. 66:22-67:5, 70:23-71:12.

32. Michael Russo ("Russo") is currently employed as the president of the YNOT Network. Russo Testimony, 10/25 Tr. 67:14-16. Russo was qualified as an expert in this case on the effectiveness of various online verification schemes, including payment card screens and data verification services, the availability of adult material outside the United States, and the availability of adult materials on the Internet. Russo Testimony, 10/25 Tr. 106:20-107:19.

33. Professor Ronald Mann ("Mann") is currently employed at the University of Texas as a law professor of electronic commerce and payment systems. Mann Testimony, 11/6 Tr. 59:6-10. Mann was qualified in this case as an expert on payment systems, payment card companies, business models of payment card companies, and the use of payment cards in E-commerce. Mann Testimony, 11/6 Tr. 73:2-75:16.

34. Professor Henry Reichman ("Dr. Reichman") is currently employed at California State University, East Bay, and is the associate editor of the American

Library Association's "Newsletter on Intellectual Freedom." Reichman Testimony, 10/30 Tr. 5:5-7, 7:1-8:5. Dr. Reichman was qualified in this case as an expert in the area of censorship and the suppression of speech. Reichman Testimony, 10/30 Tr. 18:2-20.

2. Defendant's Experts

35. Dr. Jeffrey Eisenach ("Dr. Eisenach") is currently employed as chairman of Criterion Economics. Eisenach Testimony, 11/13 Tr. 42:1-5. Dr. Eisenach was qualified as an expert in this case on the Internet and its impact on markets and public policy. Eisenach Testimony, 11/13 Tr. 71:25-72:10.

36. Professor Stephen Neale ("Dr. Neale") is currently employed at Rutgers University as a professor of philosophy. Neale Testimony, 11/8 Tr. 186:1-5. Dr. Neale was qualified in this case as an expert on information content on the theoretical bases of linguistic classification and the classification of text documents for content. Dr. Neale was also received as an expert regarding the theoretical or inherent limits of Internet filtering software as a mechanism to block access to types of content on the Web to the extent that such software relies on text-based classification. Neale Testimony, 11/8 Tr. 203:11-205:21.

37. Professor Philip Bradford Stark ("Dr. Stark") is currently employed at the University of California, Berkley as a tenured statistics professor. Stark Testimony, 11/8 Tr. 74:1-25. Dr. Stark was qualified as an expert in this case in the areas of statistics and computer-related statistics. Stark Testimony, 11/8 Tr. 83:3-12.

38. Paul Mewett ("Mewett") is currently employed at CRA International as the head of the Internet Intelligence Unit. Mewett Testimony, 11/7 Tr. 85:18-86:11. Mewett was qualified in this case as an expert in the areas of computer technology, the interaction of computers with the Internet and the Web, and the identification of content on the Internet. Mewett Testimony, 11/7 Tr. 93:4-18.

39. Arthur E. Clark, Jr. ("Clark") is currently employed as a managing partner of Business Insights. Clark Testimony, 11/14 Tr. 11:12-13. Clark was qualified as an expert in this case on the use and effectiveness of payment cards on the Internet and related aspects. Clark Testimony, 11/14 Tr. 34:18-37:13.

40. Professor Scott Morris Smith ("Dr. Smith") is currently employed at Brigham Young University as a professor of marketing and director of the institute for marketing. S. Smith Testimony, 11/15 Tr. 4:3-9. Dr. Smith was qualified as an expert in this case in the areas of Internet research and methodology, advanced computer applications for Internet survey research and analysis, Internet marketing in businesses, and buyer or consumer behavior. S. Smith Testimony, 11/15 Tr. 40:17-42:15.

D. Information Regarding Plaintiffs' Web Sites and the Content Thereon and Select Plaintiffs' Fear of Prosecution under COPA

41. There are numerous examples of material on the plaintiffs' Web pages that contain an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast which might be considered harmful to minors. Walsh Testi-

mony, 10/23 Tr. 141:10-17, 144:3-145:8, 146:6-13, 146:24-147:5, 147:9-18, 147:25-148:12, 152:8-15; Pl. Ex. 39, at 1-5, 61-78, 94-135; Findings of Fact 55, 58; Griscom Testimony, 10/23 Tr. 68:16-69:1, 70:4-9, 73:25-74:6, 74:16-23, 77:10-14, 79:7-13; Pl. Ex. 38 at 13, 17-18; Findings of Fact 51-52; Glickman Testimony, 10/30 Tr. 130:23-131:10 (stating that Condomania has frank and honest discussions on the "website about anal sex, lubricants and condoms for anal sex, lubricants for such acts as fisting, dental dams for both vaginal oral sex and anal oral sex"); Peckham Testimony, 10/31 Tr. 26:13-27:4; Pl. Ex. 41 (defining sexual slang words and giving sexually graphic examples of their use); Corinna Testimony, 11/2 Tr. 81:10-15, 82:7-12, 87:25-88:6, 89:6-11, 95:10-15; Pl. Ex. 42, at 2, 12, 13-15, 16-17, 26-28; Findings of Fact 46-48.

42. The plaintiffs speak in support of their businesses on the Web. The speech on the plaintiffs' Web sites is designed to assist in making a profit. Walsh Testimony, 10/23 Tr. 112:20-21; Tepper Testimony, 10/30 Tr. 176:11-13; Glickman Testimony, 10/30 Tr. 92:12-13; Griscom Testimony, 10/23 Tr. 52:25-53:1; Peckham Testimony, 10/31 Tr. 23:6-10; Corinna Testimony, 11/2 Tr. 100:1-5.

43. Nonetheless, the majority of information on the plaintiffs' Web sites is provided to users for free. Walsh Testimony, 10/23 Tr. 161:4-6 (all of Salon's content is available today for free); Tepper Testimony, 10/30 Tr. 194:13-15 (all of Sexual Health Network's content is available for free); Glickman Testimony, 10/30 Tr. 108:11-20; Griscom Testimony, 10/23 Tr. 64:5-13 (most of Nerve's content is available for free); Peckham Testimony, 10/31 Tr. 55:17-56:6; Corinna Testimony, 11/2 Tr.

74:10-11 (Scarleteen.com's content is available for free), 95:25-96:1 (some of the content on Femmerotic.com is available for free), 102:1-24, 126:2-127:9 (all of the content of Scarletletters.com posted in the last two years is available for free).

44. Most of the information on the plaintiffs' Web sites can be accessed without requiring users to register, provide a password or log-in, or otherwise provide any personal, identifying information in order to access the material. Walsh Testimony, 10/23 Tr. 158:16-22; Tepper Testimony, 10/30 Tr. 190:11-18; Peckham Testimony, 10/31 Tr. 30:12-18, 42:19-23.

45. A significant number of the Internet users who access the material on the plaintiffs' Web sites are individuals who do not live in the United States. Walsh Testimony, 10/23 Tr. 113:23-114:19 ("we get roughly 20 percent of our traffic now from international readers"); Tepper Testimony, 10/30 Tr. 181:10-18 ("approximately 15 percent" of users come from overseas); Griscom Testimony, 10/23 Tr. 56:14-17 (15 percent of Nerve's visitors are from overseas); Peckham Testimony, 10/31 Tr. 25:14-17 (37 percent of Urban Dictionary's users are from overseas); Glickman Testimony, 10/30 Tr. 99:16-22.

46. Scarletletters.com is a Web site "intended to deliver sexuality information as well as entertainment by women for female users" and includes content that is sexually explicit. Corinna Testimony, 11/2 Tr. 73:2-5, 88:1-89:25; J. Ex. 1 ¶¶ 9-10, 35; Pl. Ex. 42, at 12 (showing sketches of male and female genitalia and intercourse), 13-15 (displaying an erotic story describing, *inter alia*, interludes involving masturbation, bondage, intercourse, and oral sex), 16 (depicting, *inter alia*, erotic photographs of genitalia and sexual situations).

47. Scarleteen.com is a "sex education and information clearing house that's aimed at teenagers and young adults" which includes content that is sexual explicit. Corinna Testimony, 11/2 Tr. 74:1-2, 77:24-85:23; J. Ex. 1 ¶¶ 11, 34; Pl. Ex. 42.

48. Femmerotic.com provides sexuality information "by women pertaining to women" and includes content that is sexually explicit. Corinna Testimony, 11/2 Tr. 75:1-5, 94:21-95:15, 127:13-16; J. Ex. 1 ¶¶ 12, 36; Pl. Ex. 42, at 1-2, 17, 26-28 (displaying erotic pictures of naked breasts, genitalia and buttocks and sexual situations).

49. Scarleteen.com, Scarletletters.com, and Femmerotic.com are operated to make a profit. Corinna Testimony, 11/2 Tr. 100:2-5.

50. Corinna does not understand the terms in COPA or what speech the statute prohibits. Corinna Testimony, 11/2 Tr. 75:20-22. Corinna also fears prosecution under COPA because she believes that some of her content is pornographic and would be prohibited by COPA. Corinna Testimony, 11/2 Tr. 76:7-17, 91:13-22, 97:13-19.

51. Nerve has speech that "frequently" includes nudity and descriptions of sexual acts. Griscom Testimony, 10/23 Tr. 58:7-13, 66:18-79:13 (*inter alia*, discussing the Henry Miller awards which include excerpts of the best sex scenes in American novels); Pl. Ex. 38, at 13 (depicting, *inter alia*, a photograph of a naked woman with stars obscuring her nipples and genitals apparently masturbating), 17-18 (describing, *inter alia*, vaginal and oral sex in graphic language), 22-24 (describing, in erotic detail, Tantric sex); J. Ex. 1 ¶¶ 39-40.

52. Nerve has video and blog sections that include nudity and depictions of sexual acts and sexual contact that are available for free and accessible to anyone. Griscom Testimony, 10/23 Tr. 73:25-74:6, 77:2-78:7.

53. Nerve is a for-profit venture with advertising being its largest revenue stream. Griscom Testimony, 10/23 Tr. 81:17-82:23.

54. Griscom, on behalf of Nerve, does not understand the terms in COPA or what speech the statute prohibits. Griscom Testimony, 10/23 Tr. 56:18-57:21. Griscom also fears prosecution under COPA and believes that others could find that some content on Nerve is harmful to minors. Griscom Testimony, 10/23 Tr. 58:3-59:7, 80:7-17.

55. Salon's Web site, Salon.com, contains content that describes and depicts sexual acts and sexual contact and exhibitions of the genitals or post-pubescent female breast. Walsh Testimony, 10/23 Tr. 141:10-17, 144:3-145:8 (discussing article entitled "My Date With A Virtual Sex Machine"), 146:6-13, 146:24-147:5 (discussing sexually explicit Japanese wood cuts), 147:9-18 (discussing sex gallery photographs from Kinsey Institute), 147:25-148:12 (discussing Abu Ghraib prison photographs including one in which a prisoner is "appearing to sodomize himself"), 152:8-15 (discussing explicit photographs on a blog entitled "My So-Called Lesbian Life"); Pl. Ex. 39, at 1-5 (depicting, *inter alia*, a photograph of two topless women in an erotic position, and two other photographs of nude women posing erotically), 24, 29 (describing sexual encounters involving oral and vaginal sex), 57-59 (discussing anal sex with a strap-on phallus), 64-74 (describing a memoir of anal sex), 75-78,

94-100 (depicting Japanese wood cuts involving, *inter alia*, oral sex with sheet-like demons, hot wax, children engaging in digital penetration, intercourse with a half-woman, half-octopus creature, vaginal penetration with a demon's nose, and clitoral stimulation with chopsticks), 101-111 (depicting Kinsey Institute images involving bondage, naked breasts, buttocks, erect penises, vaginas, and a variety of sexual situations including a woman straddling a seated man whose penis is penetrating the woman's vagina), 112-118 (depicting erotic photographs of naked breasts buttocks and genitalia), 119-135.

56. Salon is a for-profit company which primarily generates revenue through online advertising. Walsh Testimony, 10/23 Tr. 112:20-21, 157:17-158:4.

57. Walsh, on behalf of Salon, does not understand the terms in COPA or what speech the statute prohibits. Walsh Testimony, 10/23 Tr. 135:22-137:5. Walsh also believes that some of Salon's content might be considered harmful to minors. Walsh Testimony, 10/23 Tr. 137:15-138:10.

58. Walsh fears prosecution under COPA, in part, because Salon has received complaints about the sexual nature of some of its material and has lost some advertising due to articles incorporating unpopular views on sexuality. Walsh Testimony, 10/23 Tr. 154:19-156:7, 157:4-15.

59. Glickman, on behalf of Condomania, does not understand the terms in COPA or what speech the statute prohibits. Glickman Testimony, 10/30 Tr. 130:3-22.

60. Dr. Tepper, on behalf of Sexual Health Network, does not understand the terms in COPA or what speech the statute prohibits. Tepper Testimony, 10/30 Tr. 195:14-197:2.

61. If COPA is enforced, Griscom, Walsh, Glickman, and Corinna would have various reactions such as considering moving overseas and risking prosecution. Griscom Testimony, 10/23 Tr. 91:7-17; Walsh Testimony, 10/23 Tr. 173:21-24; Glickman Testimony, 10/30 Tr. 136:13-18; Corinna Testimony, 11/2 Tr. 104:17-105:5. Dr. Tepper does not know what he would do if COPA went into effect because he does not think it would be financially feasible for his company to use an age verification system and he does not know if he would be willing to risk violating COPA. Tepper Testimony, 10/30 Tr. 243:7-17.

E. Sexually Explicit Materials Available on the Web

1. In General

62. A little more than 1 percent of all Web pages on the Surface Web (amounting to approximately 275 million to 700 million Web pages) are sexually explicit. Zook Testimony, 10/26 Tr. at 88:22-89:17; Mewett Testimony, 11/8 Tr. 48:19-49:9; Pl. Ex. 29, at 6-7; Pl. Ex. 54, at 101; Def. Ex. 65.

2. The Amount of Foreign Sexually Explicit Material on the Web

63. Although the parties disagree on how to determine whether a Web site is foreign or domestic in origin, their experts' views regarding the amount of foreign sexually explicit materials available on the Web are not

dissimilar. The evidence submitted by the plaintiffs' expert Dr. Zook shows that 32 percent of adult membership Web sites and 58 percent of free adult Web sites originate from outside the United States. Zook Testimony, 10/26 Tr. 111:2-112:1; Pl. Ex. 29 at 18-19. The evidence submitted by defendant's expert Dr. Stark shows that 55.8 percent of the Web pages randomly sampled from the Google search engine index were hosted outside of the United States and 44.4 percent of the Web pages randomly sampled from the MSN search engine index were hosted outside of the United States. Def. Ex. 62 ¶ 10; Def. Ex. 65. From the weight of the evidence excerpted here, I find that a substantial number (approximately 50 percent) of sexually explicit websites are foreign in origin.

64. Dr. Stark's data also indicated that, of the sexually explicit Web pages returned in response to a random sample of search terms entered into the AOL, MSN and Yahoo! search engines, 11.6 percent of those Web pages were from foreign Web sites. Dr. Stark's data further indicated that, of the sexually explicit Web pages returned in response to the most popular search terms according to Wordtracker, which markets lists of the most popular search terms, 12.6 percent of those Web pages were from foreign Web sites. Def. Ex. 62, at 10-11; Def. Ex. 65. However, I find that this data is not relevant because I find that Dr. Stark's samples from search engine index data (detailed in Finding of Fact 63), which consists of all of the Web sites indexed by the search engines, are a more accurate indication of how many Web sites are sexually explicit and foreign than samples of search term results which show only the fre-

quency with which searches return sexually explicit Web pages.

65. The National Research Council ("NRC") report, commissioned by Congress, specifically noted that some estimates place as much as 75 percent of adult membership Web sites overseas. Pl. Ex. 54, at 101.

66. The percentage of adult Web sites registered overseas is increasing while, in the past five years, there has been a corresponding decrease in the percentage of adult Web sites located in the United States. Zook Testimony, 10/26 Tr. 107:24-112:9; Pl. Ex. 29, at 13-17, Tables 4, 6, 8, 9. Free adult Web sites are migrating at the highest rates. From 2001 to 2006, the United States' share of free adult Web sites dropped from 60 percent to 42 percent. Zook Testimony, 10/26 Tr. 109:25-111:1; Pl. Ex. 29, Table 9.

F. Internet Content Filtering Technology and its Effectiveness

1. In General

67. Internet content filters ("filters") are computer applications which, *inter alia*, attempt to block certain categories of material from view that a Web browser or other Internet application is capable of displaying or downloading, including sexually explicit material. Filters categorize and block Web sites or pages based on their content. By classifying a site or page, and refusing to display it on the user's computer screen, filters can be used to prevent children from seeing material that might be considered unsuitable. In addition, businesses often use filters to prevent employees from accessing on employer controlled computers Internet resources that

are either not work related or otherwise deemed inappropriate. J. Ex. 1 ¶ 85.

68. Filters can be programmed or configured in a variety of different ways according to, *inter alia*, the values of the parents using them and the age and maturity of their children. As discussed more fully below, filters can be set up to restrict materials available on Web pages and other Internet applications based on numerous factors including the type of content they contain, the presence of particular words, the address of the Web site, the Internet protocol used, or computer application used. Some filters can also restrict Internet access based on time of day, day of week, how long the computer has been connected to the Internet, or which user is logged onto a computer. Cranor Testimony, 10/23 Tr. 233:1-234:13, 250:1-251:16; Cranor Testimony, Tr. 10/24 Tr. 5:9-6:8, 7:1-8:9; Allan Testimony, 11/2 Tr. 204:22-207:16, 236:22-237:7, 238:16-20, 240:18-241:8, 246:19-247:21; Allan Testimony, 11/6 Tr. 5:22-6:2; Whittle Testimony, 10/31 Tr. 200:2-16, 201:18-212:24, 212:25-213:24, 220:5-221:14; Murphy Testimony, 11/1 Tr. 210:7-213:25, 217:21-221:7; Pl. Ex. 6; Pl. Ex. 11; Pl. Ex. 54; Pl. Ex. 86.

69. Some filters can be purchased on a Compact Disc ("CD") or downloaded from the Internet and installed on a personal computer. Some filters are designed to be run on a server in a business, library, or school environment. Other filters are built into the services provided by Internet Service Providers ("ISP"). J. Ex. 1 ¶ 86.

70. Filters use different mechanisms to attempt to block access to material on the Internet including: black lists, white lists, and dynamic filtering. *Id.* ¶¶ 87, 90, 92.

71. Black lists are lists of URLs or Internet Protocol ("IP") addresses that a filtering company has determined lead to content that contains the type of materials its filter is designed to block. *Id.* ¶ 87.

72. White lists are lists of URLs or IP addresses that a filtering company has determined do not lead to any content its filter is designed to block, and, thus, should never be blocked. A very restrictive filter, like a "walled garden" filter, might block all URLs except those included on a white list. *Id.* ¶ 90.

73. In addition to its own black and white lists, filters often give parents or administrators the option of creating customized black or white lists. *Id.* ¶ 91.

74. Dynamic filtering products use artificial intelligence to analyze Web site content in real-time as it is being requested and determine whether it should be blocked by evaluating a number of different parts of the content, both what the user can actually see on the Web page, and the various hidden pieces of information contained with the content that are part of its software code or script, known as the "metadata." Among other things, dynamic filters analyze the words on the page, the metadata, the file names for images, the URLs, the links on a page, the size of images, the formatting of the page, and other statistical pattern recognition features, such as the spatial patterns between certain words and images, which can often help filters categorize content even if the actual words are not recognized. *Id.*, ¶ 92; Cranor Testimony, 10/23 Tr. 239:23-244:18.

75. In addition to analyzing the content of Web pages, dynamic filters also take the context of the page into consideration, to ensure that the determinations are

as accurate as possible. For example, many companies will develop templates that provide additional context to teach the software how to recognize certain contexts—for example, to block the word "breast" when used in combination with the word "sexy," but not when used in combination with the words "chicken" or "cancer." The software analyzes context, in part, by utilizing statistical pattern recognition techniques to identify common features of acceptable and unacceptable Web pages, depending on the context in which the content appears. Cranor Testimony, 10/23 Tr. 243:5-244:6; Whittle Testimony, 10/31 Tr. 201:4-17, 204:17-205:25.

76. Filters can be used by parents to block material that is distributed on the Web and on the other widely used parts of the Internet through protocols other than HTTP and through other Internet applications. For example, filters can be used to block any Internet application, including email, chat, instant messaging, peer-to-peer file sharing, newsgroups, streaming video and audio, Internet television and voice over Internet protocol ("VoIP"), and other Internet protocols such as FTP. J. Ex. 1 ¶ 95; Cranor Testimony, 10/24 Tr. 47:25-48:19; Pl. Ex. 6; Pl. Ex. 8; Pl. Ex. 54; Pl. Ex. 86; Pl. Ex. 88; Whittle Testimony, 10/31 Tr. 207:17-209:24, 212:25-213:15, 220:14-20; Murphy Testimony, 11/1 Tr. 203:21-204:3, 217:19-218:22; Allan Testimony, 11/2 Tr. 236:22-239:5, 246:19-248:10; Allan Testimony, 11/6 Tr. 5:22-8:23.

77. In addition to blocking access to these Internet applications completely, some products provide parents with the option of providing limited access to these applications. For example, instant messaging and email may be permitted, but some of the filtering products will only permit the sending and receiving of messages from

certain authorized individuals, and will block e-mails or instant messages containing inappropriate words or any images. Filtering programs can also completely prevent children from entering or using chat rooms, or some can merely filter out any inappropriate words that come up during a chat session. Cranor Testimony, 10/24 Tr. 7:1-17; Allan Testimony, 11/2 Tr. 236:24-237:3, 238:11-20; Allan Testimony, 11/6 Tr. 5:22-7:8; Whittle Testimony, 10/31 Tr. 202:10-209:24, 212:25-213:15, 220:14-20; Murphy Testimony, 11/1 Tr. 210:7-213:25, 217:19-221:7, 235:21-238:13; Pl. Ex. 86, at 6-7.

78. Some filtering programs offer only a small number of settings, while others are highly customizable, allowing a parent to make detailed decisions about what to allow and what to block. Filtering products do this by, among other things, enabling parents to choose which categories of speech they want to be blocked (such as sexually explicit material, illicit drug information, information on violence and weapons, and hate speech) and which age setting they want the product to apply. For example, AOL's filtering product enables parents to choose from four different age settings: general (unrestricted); mature teen; young teen; and kids only. Surfcontrol's product has 13 different categories of speech that can be blocked if a parent so desires. Cranor Testimony, 10/23 Tr. 233:2-21; Pl. Ex. 86; Allan Testimony, 11/2 Tr. 205:16-207:16, 240:18-243:2; Whittle Testimony, 10/31 Tr. 200:2-16, 202:10-203:8, 206:23-212:13, 220:5-25; Murphy Testimony, 11/1 Tr. 210:7-213:25, 217:25-221:7.

79. Filtering products can be used by parents even if they have more than one child. For example, if a family has four children, many filtering products will enable the parent to set up different accounts for each child, to

ensure that each child is able to access only the content that the parents want that particular child to access. Cranor Testimony, 10/23 Tr. 239:11-22; Cranor Testimony, 10/24 Tr. 36:16-38:11; Pl. Ex. 86, at 15-22, 33-39.

80. Filtering products block both Web pages originating from within the United States and Web pages originating from outside the United States. The geographic origin of a Web page is not a factor in how a filter works because the filter analyzes the content of the Web page, not the location from which it came. Cranor Testimony, 10/24 Tr. 46:20-47:8; Pl. Ex. 6; Pl Ex. 54; Allan Testimony, 11/2 Tr. 185:6-12; Whittle Testimony, 10/31 Tr. 202:1-3; Murphy Testimony, 11/1 Tr. 224:6-14, 226:6-228:21; Pl. Ex. 133.

81. Filtering products block both non-commercial and commercial Web pages. It does not make a difference to filtering products' effectiveness if a page is from a non-commercial or a commercial entity. Cranor Testimony, 10/24 Tr. 47:9-24; Pl. Ex. 6; Pl. Ex. 54; Whittle Testimony, 10/31 Tr. 202:7-9; Allan Testimony. 11/2 Tr. 246:6-11.

82. In addition to their content filtering features, filtering products have a number of additional tools to help parents control their children's Internet activities. Other tools available to parents include monitoring and reporting features that allow supervising adults to know which sites a minor has visited and what other types of activities a minor has engaged in online. AOL, for example, offers a feature called AOL Guardian, which provides a parent with a report indicating which Web sites a child visited, which sites were blocked, the number of emails and instant messages a child sent, and to whom

a child sent email or instant messages. Surfcontrol similarly provides parents with reports of the Web sites a child has visited, as well as those that were blocked. Surfcontrol's product also has the ability simply to monitor a child's activity without actually blocking anything, if a parent prefers that option. Some of the products, such as Contentwatch's filter, have features that permit parents to monitor their child's Internet activities remotely, for example, while they are at work, and some products even send email alerts to parents when inappropriate material is accessed by a child so that, if a parent so desires, it can supervise their child's Internet activities even when they are not physically with the child. Cranor Testimony, 10/23 Tr. 234:2-13, 249:21-251:15; Cranor Testimony, 10/24 Tr. 28:5-29:13; Pl. Ex. 2; Pl. Ex. 86, at 10-13, 32; Whittle Testimony, 10/31 Tr. 210:2-212:13; Murphy Testimony, 11/1 Tr. 218:23-220:23.

83. Some Internet content is now capable of being viewed on devices other than traditional personal computers. Examples include mobile devices such as cellular phones, personal digital assistants ("PDAs") such as the Blackberry, portable audio/video players such as the iPod, and game consoles such as the XBox or PlayStation. J. Ex. 1 ¶ 96.

84. Several vendors, including large, experienced software companies, currently offer content filtering products for alternative devices. Examples include products offered by Ace*comm, Bytemobile, Blue Coat, Cisco, and RuleSpace. Felten Testimony, 10/25 Tr. 25:4-20; Sena Testimony, 11/2 Tr. 33:4-6, 60:7-14; Pl. Ex.13, at 22-23; Pl. Ex. 70; Allan Testimony, 11/2 Tr. 223:2-23.

85. At this time, however, there are no U.S. mobile telecommunications carriers that use filters for their cellular phones other than walled garden filters and certain other parental control features which can prevent children from using chat rooms, instant messaging, text messaging, email, purchasing any file downloads or having any access to the Internet at all. Felten Testimony, 10/25 Tr. 25:22-26:17; Ryan Testimony, 11/6 Tr. 30:20-36:19; Allan Testimony, 11/2 Tr. 223:2-23.

86. Nonetheless, mobile carriers are actively soliciting bids for the provision of mobile content filtering services. The top five mobile carriers in the United States, Cingular, Verizon Wireless, T-Mobile, Sprint, and Alltel, are all soliciting bids. Sena Testimony, 11/2 Tr. 56:19-57:09.

2. The Availability and Cost of Filters

87. Filters are widely available and easy to obtain. Numerous filtering products are sold directly to consumers, either in stores or over the Internet. Filters are also readily available through ISPs. Because most ISPs offer filtering products, a parent does not have to do anything to obtain a filter other than to activate it through the ISP's Web site or to call the ISP. Cranor Testimony, 10/24 Tr. 8:8-9:9.

88. Many of the ISPs offer filters to their customers for free. AOL's filter is now even available for free to anyone who wants to use it, even non-AOL subscribers. Cranor Testimony, 10/24 Tr. 9:10-24.

89. Non-ISP filtering products vary in cost, ranging from approximately $20 to $60. Cranor Testimony, 10/24 Tr. 9:10-17.

90. Most of the filtering products offer money-back guarantees or free trial periods, so that parents can simply download a filtering product for free over the Internet and then use it for a set time period to see if it is something that they want to continue using. Cranor Testimony, 10/24 Tr. 12:12-22; Eisenach Testimony, 11/13 Tr. 177:8-25.

91. Microsoft's new operating system for personal computers, Vista, also includes parental controls and filters which are available at no additional cost to users of computers with the Vista operating system. Vista's content filter provides features similar to what are found in most current filtering products, including the ability to select which categories of speech should be filtered. Vista's filter also provides parents with other access control tools, such as time management, the ability to filter non-Web Internet applications like email, and the ability to block or restrict access to online games. Cranor Testimony, 10/24 Tr. 12:23-13:7, 16:14-17:8; Pl. Ex. 2.

3. Filter Ease of Use and User Satisfaction

92. Filtering programs are fairly easy to install, configure, and use and require only minimal effort by the end user to configure and update. Cranor Testimony, 10/24 Tr. 21:3-39:7; Pl. Ex. 3, at 4-5; Pl. Ex. 6; Pl. Ex. 54, at 317-320; Pl. Ex. 85, at 4; Pl. Ex. 86.

93. The plaintiffs' expert Dr. Cranor has confirmed this finding in various tests performed over the past decade in connection with her work for the Internet Online Summit, her testimony before the COPA Commission, and her expert testimony in the five previous lawsuits challenging state versions of COPA. For example,

Dr. Cranor recently tested four filters and found that three were very, very easy to use and one was somewhat easy to use. Dr. Cranor also found that the current versions of the filter products had improved and were easier to use than the older versions. Cranor Testimony, 10/24 Tr. 18:13-19:1, 19:2-13, 168:11-18.

94. Dr. Cranor's opinion is consistent with the findings of filtering studies conducted over the years. Those studies have found that many filtering products require little effort for parents to install and use. For example, a study conducted for NetAlert and the Australia Broadcast Authority concluded that certain products, such as AOL's filter, were quite easy to use and install. Cranor Testimony, 10/24 Tr. 57:9-18, 68:7-21; Pl. Ex. 5, at 32; Pl. Ex. 6, at 21; Pl. Ex. 85, at 4.

95. Almost all parents will be able to install filtering products and use them by selecting from one of their standard settings. Many filters have user interfaces that are quite easy to use and that make it easy for users to create customized settings, especially if all they are concerned about blocking is adult material. Cranor Testimony, 10/24 Tr. 19:19-20:7, 20:19-21:2, 27:1-24; Whittle Testimony, 10/31 Tr. 200:2-16, 206:23-212:13; Murphy Testimony, 11/1 Tr. 221:8-224:5; Pl. Ex. 2, at 17; Pl. Ex. 6; Pl. Ex. 85, at 4; Pl. Ex. 86, at 8-9.

96. Installing and setting up a filter will usually take a typical computer user no more than ten or fifteen minutes. The installation and set-up process is not technically complex and does not require any special training or knowledge. Cranor Testimony, 10/24 Tr. 21:3-22:8; Pl. Ex. 86.

97. Configuring a filtering product for more than one child is straightforward and easy with many products. For example, it takes about two minutes to set up an account for an additional child using AOL's filter product. Cranor Testimony, 10/24 Tr. 36:16-38:15; Pl. Ex. 86, at 33-39.

98. Most filtering products do not pose any compatibility issues for computers, meaning that using filters will not affect the typical user's ability to use other computer software. Cranor Testimony, 10/24 Tr. 40:9-41:6.

99. A study done for AOL found that 85 percent of parents are highly satisfied with their AOL Parental Controls products, and that 87 percent of the parents find them easy to use. Surfcontrol has also found that customer response is positive and that 70 to 80 percent of their customers renew their subscriptions to Surfcontrol's filter. Cranor Testimony, 10/24 Tr. 83:7-11, 129:9-130:13; Murphy Testimony, 11/1 Tr. 222:25-223:20; Pl. Ex. 85, at 4.

4. The Effectiveness of Filters

a. In General

100. There are two main concerns regarding the effectiveness of filters: underblocking and overblocking. Underblocking occurs when the filter fails to block content that the filter is configured to block. Overblocking occurs when the filter prevents access to material that it is not configured to block. Cranor Testimony, 10/24 Tr. 52:16-21; Stark Testimony, 11/8 Tr. 95:16-96:13, 105:25-106:12.

101. The plaintiffs contend that in determining whether filters are effective, the filter's underblocking rate

is more important than its overblocking rate. Cranor Testimony, 10/24 Tr. 52:22-53:6. Defendant claims that overblocking is a significant concern as well. Stark Testimony, 11/8 Tr. 95:22-96:18. While both aspects are important, I agree with the plaintiffs that underblocking is the more important concern since the underlying issue in this case is the prevention of children from accessing sexually explicit material deemed harmful to them. Moreover, when a filter overblocks, a parent may add the Web sites that were erroneously overblocked to the filter's white list so that those Web sites are not blocked again. J. Ex. 1 ¶ 91.

102. Even though the Web is very large, only a small fraction of it is actually viewed frequently. To ensure that those parts that are actually being viewed by users have been located, filtering companies review lists of the most popular Web sites because the pages on those sites are the most likely ones that a child will be able to find and access. Cranor Testimony, 10/23 Tr. 236:22-237:7; Murphy Testimony, 11/1 Tr. 194:6-196:6.

103. Filtering products have improved over time and are now more effective than ever before. This is because, as with all software, the filtering companies have addressed problems with the earlier versions of the products in an attempt to make their products better. Cranor Testimony, 10/24 Tr. 81:18-82:10; Murphy Testimony, 11/1 Tr. 194:6-196:6, 221:8-222:24.

104. Another reason the effectiveness of filtering products has improved is that many products now provide multiple layers of filtering. Whereas many filters once only relied on black lists or white lists, many of today's products utilize black lists, white lists, and real-

time, dynamic filtering to catch any inappropriate sites that have not previously been classified by the product. Cranor Testimony, 10/23 Tr. 246:20-247:9; Cranor Testimony, 10/24 Tr. 81:18-82:4.

105. There is a high level of competition in the field of Internet content filtering. That factor, along with the development of new technologies, has also caused the products to improve over time. Murphy Testimony, 11/1 Tr. 223:21-224:5; Pl. Ex. 2, at 16-17.

106. One of the features of filtering programs that adds to their effectiveness is that they have built-in mechanisms to prevent children from bypassing or circumventing the filters, including password protection and other devices to prevent children from uninstalling the product or changing the settings. Some products even have a tamper detection feature, by which they can detect when someone is trying to uninstall or disable the product, and then cut off Internet access altogether until it has been properly reconfigured. Cranor Testimony, 10/24 Tr. 86:19-87:21; Felten Testimony, 10/25 Tr. 37:5-38:7; Murphy Testimony, 11/1 Tr. 216:12-217:18; Whittle Testimony, 10/31 Tr. 215:7-14; Pl. Ex. 2; Pl. Ex. 86.

107. Filtering companies actively take steps to make sure that children are not able to come up with ways to circumvent their filters. Filtering companies monitor the Web to identify any methods for circumventing filters, and when such methods are found, the filtering companies respond by putting in extra protections in an attempt to make sure that those methods do not succeed with their products. Cranor Testimony, 10/24 Tr. 86:19-87:21; Felten Testimony, 10/25 Tr. 38:8-39:1.

108. It is difficult for children to circumvent filters because of the technical ability and expertise necessary to do so by disabling the product on the actual computer or by accessing the Web through a proxy or intermediary computer and successfully avoiding a filter on the minor's computer. Cranor Testimony, 10/24 Tr. 86:19-87:21; Felten Testimony, 10/25 Tr. 36:6-40:4; Murphy Testimony, 11/1 Tr. 216:12-217:18; Whittle Testimony, 10/31 Tr. 215:7-14.

109. Accessing the Web through a proxy or intermediary computer will not enable a minor to avoid a filtering product that analyzes the content of the Web page requested, in addition to where the page is coming from. Any product that contains a real-time, dynamic filtering component cannot be avoided by use of a proxy, whether the filter is located on the network or on the user's computer. Felten Testimony, 10/25 Tr. 38:08-39:24.

b. Study Results

110. Based upon the testimony of Dr. Cranor, which I accept, I find that filters generally block about 95% of sexually explicit material. Cranor Testimony, 10/24 Tr. 55:8-23.

111. One study, conducted for NetAlert and the Australia Broadcast Authority, measured the effectiveness of various filtering products at blocking a variety of different categories of content that parents might want to block, including pornography and erotica. The study found that some products, such as AOL's filter, blocked close to 100 percent of all pornography or erotica when the most restrictive setting (for children under the age of 12) was chosen. When a less restrictive setting (for 13 to 15 year-olds) was selected, the study found that about

90 percent of the pornography and erotica was blocked. Pl. Ex. 5, at 35-36.

112. Another study, conducted by Corey Finnel ("Finnel") for the government in another case, analyzed the overblocking rates of three filtering products. Finnel found that the overblocking rates for those three products respectively were between 4.69 percent and 7.99 percent, between 5.25 percent and 11.03 percent, and between 6.92 and 9.36 percent, using a 95 percent confidence interval. Cranor Testimony, 10/24 Tr. 60:4-61:25; Pl. Ex. 4.

113. Consumer Reports has also conducted reviews of the various filtering products available to parents. Their most recent study concluded that filters are very good or excellent at blocking pornography, and that they block most, but not all, of that content. More specifically, Consumer Reports found that three products, from AOL, KidsNet and MSN, blocked practically every pornographic site that they tested, and that the least effective product they tested still blocked 88 percent of pornography. Cranor Testimony, 10/24 Tr. 70:9-22; Pl. Ex. 8, at 3. Although the methodology for this study may well be less rigorous than that of other more academic studies, the study is still informative because Consumer Reports focuses its evaluations on the criteria that are important to potential consumers and helps to shed light on whether the filters tested will be usable by a parent. Cranor Testimony, 10/24 Tr. 69:14-70:4.

114. Two separate reports commissioned by Congress, from the Commission on Child Online Protection ("COPA Commission") and the NRC, have confirmed that content filters can be effective at preventing minors

from accessing harmful materials online. Cranor Testimony, 10/24 Tr. 71:2-76:5; Pl. Ex. 6; Pl. Ex. 54.

115. The COPA Commission was established by Congress as part of the COPA legislation. The COPA Commission report concluded that although filters are not perfect, server-side filters (meaning filters provided by an ISP) using only black lists and not utilizing other technologies such as dynamic filtering "can be highly effective" and client-side filters (meaning filters installed on a home computer) using only black lists "can be effective" in "directly blocking access to global harmful to minors content on the Web and also on newsgroups, email, and chat rooms." Cranor Testimony, 10/24 Tr. 71:22-72:9; Pl. Ex. 6, at 19, 21.

116. The NRC issued a lengthy report in 2005. The NRC report concluded that although not perfect because filters overblock and underblock, and children can gain access to computers without filters, "[f]ilters have some significant utility in denying access to content that may be regarded as inappropriate" and, "filters can be highly effective in reducing the exposure of minors to inappropriate content if the inability to access large amounts of appropriate material is acceptable." Cranor Testimony, 10/24 Tr. 75:15-76:3; Pl. Ex. 54, at 40, 331.

117. Defendant's expert Mewett found that, in the filter study conducted by Dr. Stark and himself, with regard to the Web pages that were returned in response to the most popular search terms, the AOL filter performed the best and blocked 98.7 percent of sexually explicit Web pages. However, Mewett found that the AOL filter overblocked 19.6 percent of non-sexually explicit Web pages. Mewett also found that the other fil-

ters he tested accurately blocked between 98.6 and 87.4 percent of the sexually explicit Web pages. In fact, of the filters tested, only two failed to block at least 90 percent of the sexually explicit Web pages and the vast majority blocked at least 95 percent of such pages. Mewett further found that these filters overblocked between 2.9 and 32.8 percent of non-sexually explicit Web pages. Def. Ex. 78.

118. Mewett also found that, with regard to the Web pages drawn randomly from the search engine indexes, the AOL filter again performed the best and blocked between 91.1 and 91.4 percent of sexually explicit Web pages. However, Mewett found that the AOL filter overblocked 22.3 to 23.6 percent of non-sexually explicit Web pages. Mewett further found that the other filters tested accurately blocked between 87.6 and 39.8 percent of the sexually explicit Web pages and overblocked between .4 and 21.9 percent of non-sexually explicit Web pages. Def. Ex. 68.

119. Mewett also found that, with regard to the Web pages that were returned in response to a random sample of search terms, the AOL filter again performed the best and blocked 93.8 percent of sexually explicit web pages. However, Mewett found that the AOL filter overblocked 12.5 percent of non-sexually explicit Web pages. Mewett further found that the other filters he tested accurately blocked between 90 and 56.6 percent of the sexually explicit Web pages and overblocked between 0 and 20.7 percent of the non-sexually explicit Web pages. Def. Ex. 74.

120. I do not find Mewett's overblocking rates to be reliable because he sometimes concluded that a filter

had overblocked even when the filter was performing exactly as intended. This occurred because Mewett was not always able to limit the filter to screening only sexually explicit material and sometimes the filter was configured to block other types of material as well. Mewett Testimony, 11/7 Tr. 210:13-212:20; *see e.g.* Def. Ex. 82, at 17 (stating that the "AOL [filter] does not have a default setting, nor does it allow for customization beyond choosing an appropriate age range for the surfer. Thus, AOL was tested on the mature teen setting . . . the mature teen setting should allow the surfer to visit all Web sites except those known to contain *violent or* adult content") (emphasis added).

121. Many of the findings in defendant's Mewett/Stark study are consistent with and similar to the findings of other filtering studies which have been conducted over the years in that the Mewett/Stark data shows that there are several filtering products that are quite effective and accurate at blocking sexually explicit material, especially the most popular Web content, and that many of the products have less than a 10 percent underblocking rate regarding such content. Cranor Testimony, 10/24 Tr. 78:3-12, 81:1-17; Def. Ex. 68; Def. Ex. 74; Def. Ex. 78.

G. Select Legislative History of COPA and the Limitations of COPA

122. According to House Report 105-775, "[t]he purpose of [COPA] is to amend the Communications Act of 1934 [47 U.S.C. § 151, *et seq.*] by prohibiting the sale of pornographic materials on the World Wide Web (or the Web) to minors." H.R. Rep. 105-775, at *5.

123. The intended "effect of [COPA] is simply to reorder the process in such a way as to require age verification before pornography is made available, essentially requiring the commercial pornographer to put sexually explicit images 'behind the counter.'" *Id.* at *15.

124. The House Report also lists the following Congressional findings:

> (1) while custody, care, and nurture of the child resides first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;
>
> (2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;
>
> (3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;
>
> (4) a prohibition on the distribution of material harmful to minors, combined with legitimate defenses, is currently the most effective means by which to satisfy the compelling government interest; and
>
> (5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educa-

tors, and industry must continue efforts to protect children from dangers posed by the Internet.

Id. at *2.

125. COPA was drafted in direct response to the Supreme Court's decision in *Reno*, 521 U.S. 844 regarding the CDA. *Id.* at *5.

126. COPA's reach is specifically limited only to files publically accessible over the Web via HTTP or a successor protocol and does not reach other forms of communication and data transfer over the Internet including email, newsgroups, message boards, peer-to-peer and other file sharing networks, chat, instant messaging, VoIP, and FTP. 47 U.S.C. § 231(e)(1); H.R. Rep. 105-775, at *12.

127. Congress added this limitation in an attempt to not burden more speech than was necessary and to attempt to ensure that COPA was narrowly tailored, unlike the CDA. H.R. Rep. 105-775, at *12.

128. COPA does not apply to Web sites which are completely free and which do not fit within the definitions of "commercial purposes" and "engaged in the business." 47 U.S.C. § 231(e)(2).

129. This limitation was specifically added by Congress to address the Supreme Court's concern that the CDA was too broad in that it covered both commercial and noncommercial speech. H.R. Rep. 105-775, at *8, *12.

130. In discussing COPA, the Commerce Committee dismissed their opponent's concerns that a "domestic legislative solution will not stop material from being

sent into the United States" and noted that the amount of foreign harmful to minors material was undocumented while "the fact remains that much of the harmful material is produced and posted in the United States." *Id.* at *20. The Committee further noted that the United States had an eight million dollar adult entertainment industry and concluded that "[c]learly domestic restrictions in the United States will help reduce a child's access to pornography. . . . To the extent that an international problem exists, the Committee has requested that the Commission on Online Child Protection study the matter and report back to Congress." *Id.*

131. In a letter dated October 5, 1998, from the Acting Assistant Attorney General to the Chairman for the Commerce Committee, explaining the views of the Department of Justice on COPA, the Assistant Attorney General explained why the Department felt that COPA would be problematic. Specifically, the Assistant Attorney General stated, *inter alia*, that:

> The Department's enforcement of [COPA] could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in combating traffickers in hard-core child pornography, in thwarting child predators, and in prosecuting large-scale and multi district commercial distributors of obscene materials.

And that:

> We do not believe that it would be wise to divert the resources that are used for important initiatives . . . to prosecutions of the kind contemplated under the COPA. Such a diversion would be particularly

> ill-advised in light of the uncertainty concerning whether the COPA would have a material effect in limiting minors' access to harmful materials. There are thousands of newsgroups and Internet relay chat channels on which anyone can access pornography, and children would still be able to obtain ready access to pornography from a myriad of overseas web sites. The COPA apparently would not attempt to address those sources of Internet pornography, and admittedly it would be difficult to do so because restrictions on newsgroups and chat channels could pose constitutional questions, and because any attempt to regulate overseas web sites would raise difficult questions regarding extraterritorial enforcement.

Pl. Ex. 55, at 2-3. The Assistant Attorney General also stated the opinion that COPA contains "troubling ambiguities" concerning the scope of its coverage including the difference between "knowing" violations of COPA and "intentional" violations of COPA. *Id.* at 3.

H. Statistical Information on Obscenity Prosecutions

132. Existing laws make it illegal to distribute material over the Internet that constitutes obscenity, 18 U.S.C. ch. 71, or child pornography, 18 U.S.C. ch 110. From 2000 to 2005, defendant initiated fewer than 20 prosecutions for obscenity which did not also accompany charges of child pornography, travel in interstate commence to engage in sex with a minor, or attempting to transfer obscene material to a minor. J. Ex. 1 ¶ 121.

133. There have been fewer than 10 prosecutions for obscenity which did not also accompany charges of child

pornography, travel in interstate commerce to engage in sex with a minor, or attempting to transfer obscene material to a minor since 2005. *Id.* ¶ 122.

I. The Affirmative Defenses in COPA and Their Availability and Effectiveness

134. It is an affirmative defense to liability under COPA when a Web site owner restricts access by minors to material that is harmful to them by requiring the use of a "credit card, debit account, adult access code, or adult personal identification number", "by accepting a digital certificate that verifies age", or by "any other reasonable measures that are feasible under available technology" in order to attempt to verify that the consumer is not a minor. 47 U.S.C. § 231(c)(1).

135. Congress included these affirmative defenses in COPA, in part, because such defenses "requiring either payment by credit card or authorization by access or identification code" had been included in "the FCC's dial-a-porn regulations [for the Communications Act of 1934, 47 U.S.C. § 223(b)], which were upheld in *Dial Information Services Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991)." H.R. Rep. 105-775, at *14.

136. In discussing this issue, the Commerce Committee also mistakenly asserted that these defenses had been "cited with approval in *Sable [Communications of California, Inc. v. F.C.C.]*, [492] U.S. 115 (1989)" and stated that:

> In *Sable*, the Court found that such commercial restrictions would be effective in excluding most juveniles, stating: "the FCC's technological approach to restricting dial-a-porn messages to adults who seek

> them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages." [492] U.S. at 130.

Id. However, the Supreme Court in *Sable* actually stated:

> *For all we know from this record*, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people would manage to secure access to such messages. *If this is the case . . .* "

Sable, 492 U.S. at 130 (emphasis added). The Supreme Court did note that the FCC, after "lengthy proceedings, determined that its credit card, access code, and scrambling rules were a satisfactory solution to the problem of keeping indecent dial-a-porn messages out of the reach of minors" and that the Court of Appeals had agreed with this assessment. *Id.* at 128. However, the Court ultimately did not rule on this issue but instead found only that Congress had not generated any "legislative findings that would justify [the Court] in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban [on indecent and obscene telephone communications], to achieve the Government's interest in protecting minors." *Id.* at 128-129. The Supreme Court concluded only that the congressional record "contain[ed] no evidence as to *how* effective or ineffective the FCC's [credit card, access code, and scrambling rules] were or might prove to be." *Id.* at 130 (emphasis original).

137. In the physical world, assessing the validity of an assertion about a person's age is relatively straightforward because of face-to-face interactions. In a retail establishment, for example, someone seeking to purchase harmful to minors material can be asked to show identification indicating the purchaser's age. The provider can view the buyer face-to-face and compare this identification to the person presenting it. That level of assurance is not available during an Internet purchase because of the absence of face-to-face interactions over the Web. Pl. Ex. 25, at 30-31; Pl. Ex. 54, at 88, 91-92.

1. The General Availability of Age Verification Technologies

138. From the weight of the evidence, I find that there is no evidence of age verification services or products available on the market to owners of Web sites that actually reliably establish or verify the age of Internet users. Nor is there evidence of such services or products that can effectively prevent access to Web pages by a minor. Russo Testimony, 10/25 Tr. 124:1-6, 143:17-20, 157:3-158:8, 164:15-165:7, 166:14-167:12; Tepper Testimony, 10/30 Tr. 234:13-15; Peckham Testimony, 10/31 Tr. 48:7-9; Cadwell Testimony, 10/31 Tr. 162:20-164:1, 174:17-175:16; Meiser Testimony, 10/31 Tr. 120:7-13, 122:15-123:20, 123:21-125:3, 127:23-128:15, 133:20-134:8, 135:13-135:25, 136:1-8, 138:3-139:21, 139:22-141:6, 143:5-144:5; Pl. Ex. 54, at 88, 91, 376-77; Pl. Ex. 25, at 3.

2. The Effectiveness of Payment Cards as a Defense and Minors Access Thereto

139. "Traditional payment cards" consist of credit, debit, and reloadable prepaid cards. Utilization of a credit card essentially creates a loan from a card issuing

company to the card holder. Clark Testimony, 11/14 Tr. 17:4-5. A debit card is a payment card that is used to make a purchase and is tied to a deposit account, primarily a checking account. Purchases of goods and services on a debit card are deducted from the individual's checking account. Clark Testimony, 11/14 Tr. 17:5-8. A prepaid card is a payment card that an individual electronically loads with cash and then proceeds to purchase goods and services. Clark Testimony, 11/14 16:24-25. Reloadable prepaid cards can be purchased for cash and after that amount is used up more money can be added; nonreloadable prepaid cards are one-time use cards such as gift cards. Clark Testimony, 11/14 Tr. 48:10-24.

140. The rules of payment card associations in this country prohibit Web sites from claiming that use of a payment card is an effective method of verifying age, and prohibit Web site owners from using credit or debit cards to verify age. Russo Testimony, 10/25 Tr. 72:23-73:10; Cadwell Testimony, 10/31 Tr. 185:15-186:11, 187:3-187:23; Thaler Testimony, 11/1 Tr. 111:20-113:20; Bergman Testimony, 11/7 Tr. 16:4-17:17, 18:21-19:25; Pl. Ex. 106, at 4; Pl. Ex. 139, at 2-4; Pl. Ex. 141, at 1.

141. Payment card associations in this country advise consumers not to offer payment cards to merchants as a proxy for age. Russo Testimony, 10/25 Tr. 72:16-73:3; Bergman Testimony, 11/7 Tr. 16:4-17:17; Pl. Ex. 139, at 2-4.

142. Defendant's expert Clark, concedes that payment cards cannot be used to verify age because minors under 17 have access to credit cards, debit cards, and reloadable prepaid cards. Clark Testimony, 11/14 Tr. 179:20-180:6.

143. Payment card issuers usually will not issue credit and debit cards directly to minors without their parent's consent because of the financial risks associated with minors. Clark Testimony, 11/14 Tr. 118:7-120:3; Rinchiuso Testimony, 11/6 Tr. 241:16-242:6; Def. Ex. 93, at 17. Nonetheless, as described below, there are many other ways in which a minor may obtain and use payment cards.

144. The plaintiffs contend that about one-half of all minors have access to credit cards, debit cards, or prepaid cards and that the percentage of 16 year-olds with access to payment cards is significantly higher than the percentage of 12 year-olds with access to such cards. Mann Testimony, 11/6 Tr. 86:12-17, 96:18-97:14, 114:17-24; Pl. Ex. 17, at 2, 7; Pl. Ex. 34, at 3-8; Pl. Ex. 93, at 10. Defendant claims that about 22 percent of minors age 12 to 17 have access to traditional payment cards either through cards in their own name (with a co-signing parent) or through a borrowed card. Clark Testimony, 11/14 Tr. 83:17-25, 84:6-85:9, 91:8-22, 96:2-96:12, 114:11-15. Clark did admit, however, that this number would be higher if he were to include minors who have access to prepaid cards which were not included in his data source. Clark Testimony, 11/14 Tr. 190:6-24, 191:5-21, 192:11-18, 193:8-13. While the parties do not agree on the exact number of minors who have access to traditional payment cards, I find from the weight of the evidence that even the lowest figures show that a significant number of minors have access to them.

145. In addition, payment card issuers are increasingly marketing credit cards, debit cards, and prepaid cards to minors as young as 13 because the "coveted youth segment" presents "dramatic revenue generating

opportunities." Visa's "Visa Buxx" card is one example of a payment card that is specifically designed to be used by minors. Mann Testimony, 11/6 Tr. 75:18-77:2, 85:14-86:11; Bergman Testimony, 11/7 Tr. 4:3-6:2, 21:16-23:19, 46:20-47:25; Pl. Ex. 25, at 23-24; Pl. Ex. 34, at 6-7; Pl. Ex. 54, at 371, 377; Pl. Ex. 148, at 2, 4.

146. It is also possible for minors to have access to credit or debit cards without the knowledge or consent of their parents. Bergman Testimony, 11/7 Tr. 8:8-9:22.

147. Even if parents review periodic payment card statements, either their own or those of cards issued with their permission to their children, they may not be able to identify transactions on sexually explicit Web sites because the adult nature of such transactions is often not readily identifiable from information provided on the statement. Clark Testimony, 11/14 Tr. 214:7-10; Pl. Ex. 54, at 93. Moreover, delay in issuing a payment card statement to parents means that unauthorized access to harmful to minors materials can occur. Pl. Ex. 6, at 25.

3. The Effectiveness of Data Verification Services

148. Some companies offer non-payment card-based services that attempt to verify the age or identity of an individual Internet user. These companies are referred to as data verification services ("DVS"). They seek to accomplish in cyberspace what a clerk checking an ID card or driver's license accomplishes in an adult bookstore, only they do not verify the age or identity of an individual; instead, they merely verify the data entered by an Internet user. Russo Testimony, 10/25 Tr. 182:20-183:13, 196:18-197:1; Meiser Testimony, 10/31 Tr. 127:25-128:15; Pl. Ex. 25, at 25-26; Pl. Ex. 54, at 367, 376.

IDology is one such company. Dancu Testimony, 11/9 Tr. 143:25-144:15, 161:12-25.

149. DVS companies cannot determine whether the person entering information into the Web site is the person to whom the information pertains. Nor is there any way for the person to whom the information pertains to know that his or her information has been used because the DVS companies do not notify people when their information has been verified. Dancu Testimony, 11/9 Tr. 260:12-261:12; Russo Testimony, 10/25 Tr. 97:24-98:8, 182:20-183:18; Meiser Testimony, 10/31 Tr. 127:23-128:15, 138:3-139:21, 143:23-145:3; Pl. Ex. 79, at 5; Pl. Ex. 25, at 31.

150. Internet users attempting to access content on a Web page that is using a DVS system will be required to provide specified personal information, such as the person's name, last four digits of the social security number, home address, home telephone number, or driver's license number. The DVS company will check this information against commercially available databases that aggregate public records, and then provide a response to the Web page operator who will have the ability to permit or decline access to that user. Russo Testimony, 10/25 Tr. 95:22-96:10, 181:24-182:19; Pl. Ex. 25, at 26-27; Pl. Ex. 54, at 92; Dancu Testimony, 11/9 Tr. 160:15-161:3, 164:10-166:5; Def. Ex. 109.

151. DVS companies rely on public records such as property, voting, and vehicle registration records, records from state Departments of Motor Vehicles, and some privately acquired information in an attempt to verify information. Russo Testimony, 10/25 Tr. 175:24-

176:17; Dancu Testimony, 11/9 Tr. 164:10-18; Pl. Ex. 54, at 92.

152. The minimum information required by a DVS company to attempt a verification is a first name, last name, street address, and zip code. Russo Testimony, 10/25 Tr. 172:24-173:1; Dancu Testimony, 11/9 Tr. 160:15-22; Pl. Ex. 76.

153. This minimum information requirement can easily be circumvented by children who generally know the first and last name, street address and zip codes of their parents or another adult. Russo Testimony, 10/25 Tr. 97:24-98:8; Dancu Testimony, 11/9 Tr. 244:11-245:3. However, in order to heighten reliability and for an additional cost, it is possible for DVS companies to generate user-specific questions based on personal historical information, such as the color of a given car or the address of a previous home. The more questions that are asked, the more apparently effective the verification process will be. Dancu Testimony, 11/9 Tr. 177:11-181:3; Russo Testimony, 10/25 Tr. 192:10-19; Def. Ex. 109, at 5. Nonetheless, I find from the testimony that without a physical delivery of goods and an accompanying visual age verification, neither the DVS nor the Web page operator can know whether an adult or a child provided the information. Attempting to verify age with this information in a consumer-not-present transaction is therefore unreliable. Russo Testimony, 10/25 Tr. 98:6-8, 183:2-13; Dancu Testimony, 11/9 Tr. 245:18-246:5; Pl. Ex. 25, at 31; Pl. Ex. 54, at 92-93.

154. DVS companies do not have access to every state's Department of Motor vehicle records, vehicle registration records, property records or voting records

and not every adult in the United States has a driver's licence, owns property, or is registered to vote. As a result, it is less likely that the information from people in such states and in such situations will be properly verified. Dancu Testimony, 11/9 Tr. 252:7-20; Meiser Testimony, 10/31 Tr. 134:11-135:25; Pl. Ex. 54, at 370.

155. DVS companies also have difficulty verifying the information of people recently married, divorced, or who otherwise have legally changed their name. Russo Testimony, 10/25 Tr. 179:4-12; Pl. Ex. 79, at 4.

156. DVS databases do not contain foreign records and cannot verify information for individuals residing outside of the United States who are not United States citizens. This limits the audience of Web sites using DVS products exclusively to Americans whose data can be verified and would be problematic for the plaintiffs who have an international audience. Finding of Fact 45; Dancu Testimony, 11/9 Tr. 253:23-254:16; Meiser Testimony, 10/31 Tr. 142:9-19; Russo Testimony, 10/25 Tr. 177:22-178:5, 180:14-181:1; Pl. Ex. 25, at 32; Pl. Ex. 79, at 1.

157. It is especially difficult for DVS companies to verify young adults (between the ages of 17 and 21) or minors, because there is little data available on younger adults, and very little, if any, data available on minors. Therefore, if Web page operators such as the plaintiffs utilize DVS products to comply with COPA, there will be young adults who will not be able to access those Web pages. Dancu Testimony, 11/9 Tr. 257:22-259:20; Meiser Testimony, 10/31 Tr. 140:1-18, 155:24-156:10; Russo Testimony, 10/25 Tr. 178:16-179:3; Pl. Ex. 79, at 4.

158. DVS companies also have difficulty verifying information for recent immigrants, visa holders, or anyone who is not a United States citizen. Dancu Testimony, 11/9 Tr. 259:21-260:5; Meiser Testimony, 10/31 Tr. 140:1-18; Pl. Ex. 79, at 4; Pl. Ex. 76.

4. The Effectiveness of Digital Certificates and Other Reasonable Measures that Are Feasible under Available Technology

159. Defendant is unaware of any digital certificates that can be used to comply with COPA. 47 U.S.C. § 231(c)(1)(B); Pl. Ex. 163, at 1-2.

160. Defendant is also unaware of any other available or feasible options which would allow Web site owners to restrict access to certain material to minors, while continuing to provide it to adults. 47 U.S.C. § 231(c)(1)(C); Pl. Ex. 163, at 1-2.

5. The Economic Burdens and Loss of Web Viewership Associated with the Affirmative Defenses

161. Based upon the below referenced evidence, I find that there are fees associated with all of the affirmative defenses and verification services identified in COPA, as well as all other services that claim to provide age verification. These fees apply any time a user attempts to access material on a Web site, even if there is no purchase. The fees must either be paid by the Web site or passed on to the users. As a result, Web sites such as the plaintiffs' sites, which desire to provide free distribution of their information, will be prevented from doing so. Russo Testimony, 10/25 Tr. 162:17-163:7, 166:1-13; Pl. Ex. 25, at 24, 33; Pl. Ex. 106, at 5, 15; Thaler Testimony, 11/1 Tr. 115:25-116:15, 116:16-117:8,

117:9-118:2; Cadwell Testimony, 10/31 Tr. 183:2-184:22; Meiser Testimony, 10/31 Tr. 146:23-147:17; Pl. Ex. 6, at 25; Pl. Ex. 54, at 93; Peckham Testimony, 10/31 Tr. 55:22-25 (Urban Dictionary's mission is to provide content for free); Corinna Testimony, 11/2 Tr. 104:13-16 (Corinna wishes to provide content for free); Griscom Testimony, 10/23 Tr. 84:25-85:14 (Nerve wants to reach widest audience possible).

162. Requiring the use of a payment card to enter a Web site would impose a significant economic cost on Web site owners. In addition to set-up fees and administrative fees, Web site owners would also need to pay fees for processing payment card information for each transaction. Russo Testimony, 10/25 Tr. 162:17-163:7; Lewis Testimony, 10/31 Tr. 109:6-24; Cadwell Testimony, 10/31 Tr. 183:2-184:22; Thaler Testimony, 11/1 Tr. 116:13-117:8, 117:9-118:2, 118:3-119:7; Corinna Testimony, 11/2 Tr. 104:17-105:7; Clark Testimony, 11/14 Tr. 239:12-240:15; Pl. Ex. 106, at 5, 15.

163. Financial institutions will not process or verify a payment card in the absence of a financial transaction. Express policies of the payment card associations prohibit online merchants who sell content from processing transactions in the amount of zero dollars. Verification by payment card will therefore be practically unfeasible for all of the plaintiffs and most other Web site operators and content providers covered by COPA who distribute their content for free. Thaler Testimony, 11/1 Tr. 119:10-16; Rinchiuso Testimony, 11/6 Tr. 242:16-24; Clark Testimony, 11/14 Tr. 214:11-218:16; Pl. Ex. 6, at 25; Pl. Ex. 34, at 10; Pl. Ex. 54, at 373.

164. Defendant contends that a product called Bitpass enables consumers to utilize credit cards for near zero-dollar transactions. Defendant's Representative, 11/9 Tr. 89:22 90:6. The Bitpass product is used to facilitate online purchases of digital content and is not currently designed for Web sites which do not sell digital content. Knopper Testimony, 11/9 Tr. 93:7-14, 111:14-112:15, 125:2-4. Moreover, Bitpass charges Web sites that use its services fees for each transaction. The fees range from 5 to 15 percent of each transaction. In addition, Bitpass may charge reporting fees and set-up fees. Knopper Testimony, 11/9 Tr. 106:17-22, 124:3-18.

165. Credit and verification charges must either be absorbed by the content provider or passed on to users. This cost will increase according to the number of visitors to a Web site. Some plaintiffs, like Nerve and Salon, have one million to three million unique visitors per month. Russo Testimony, 10/25 Tr. 162:17-163:7, 166:1-13; Griscom Testimony, 10/23 Tr. 54:25-55:4; Walsh Testimony, 10/23 Tr. 116:1-117:1; Pl. Ex. 6, at 25; Pl. Ex. 106, at 5, 15; Peckham Testimony, 10/31 Tr. 24:16-23 (Urban Dictionary has 330,000 visitors per day).

166. DVS companies like IDology charge a minimum of 37 cents for each verification transaction. The cost can rise to 97 cents per transaction, for a more complete verification service. Every time an Internet user comes to a Web page that requires its visitors to pass through a DVS screen, the DVS will charge that Web page operator something in the range of 37 to 97 cents to perform the verification service. Dancu Testimony, 11/9 Tr. 221:25-222:4; Russo Testimony, 10/25 Tr. 186:2-6, 192:10-19; Meiser Testimony, 10/31 Tr. 146:23-147:17; Pl. Ex. 25, at 26-28.

167. In addition to the per-transaction fees, DVS companies also charge other fees such as application and set-up fees and optional integration fees which range from $195 to $495. Dancu Testimony, 11/9 Tr. 222:5-18; Russo Testimony, 10/25 Tr. 192:20-193:4, 195:8-14.

168. It is not economically feasible for a Web page operator, especially one that provides free content, to verify the information of every customer that visits the Web page with a DVS. Russo Testimony, 10/25 Tr. 96:25-97:14; Pl. Ex. 25, at 30, 33. As one example, Urban Dictionary had approximately 40 million visitors between January and October of 2006. Peckham Testimony, 10/31 Tr. 24:20-23. If Urban Dictionary had been forced to have its users pass through a DVS such as IDology, and was not given a bulk discount, Urban Dictionary would have incurred costs from between $14,800,000 to $38,800,000. Dancu Testimony, 11/9 Tr. 221:25-222:4.

169. Because of the sexually explicit nature of the content on their Web sites, many Web site owners, including some of the plaintiffs, would be forced to place a credit card or age verification screen on the initial home page of their Web sites and/or on each individual Web page in order to ensure that no user could access any of the content on the site until passing through such a screen. Tepper Testimony, 10/30 Tr. 241:18-242:7; Peckham Testimony, 10/31 Tr. 48:1-6.

170. Requiring users to provide a credit card or personal information before they can browse a Web page to determine what it offers will deter most users from ever accessing those pages, causing the traffic to Web sites such as the plaintiffs' to fall precipitously. Walsh Testi-

mony, 10/23 Tr. 161:25-162:11, 163:4-164:2, 170:7-11, 171:15-172:9, 173:10-20; Glickman Testimony, 10/30 Tr. 134:6-136:4; Tepper Testimony, 10/30 Tr. 238:9-239:17; A. Smith Testimony, 10/26 Tr. 188:24-189:10; Snellen Testimony, 11/2 Tr. 136:2-12; Clark Testimony, 11/14 Tr. 242:13-243:16.

171. For a plethora of reasons including privacy and financial concerns (discussed further below) and the fact that so much Web content is available for free, many Web users already refuse to register, provide credit card information, or provide real personal information to Web sites if they have any alternative. Because requiring age verification would lead to a significant loss of users, content providers would have to either self-censor, risk prosecution, or shoulder the large financial burden of age verification. Griscom Testimony, 10/23 Tr. 88:8-20; Walsh Testimony, 10/23 Tr. 161:25-162:11, 163:4-11, 164:20-165:16, 170:7-11, 171:5-172:9, 173:10-20; Russo Testimony, 10/25 Tr. 146:14-148:16; A. Smith Testimony, 10/26 Tr. 188:24-189:10; Glickman Testimony, 10/30 Tr. 135:14-136:4; Tepper Testimony, 10/30 Tr. 238:9-239:17; Peckham Testimony, 10/31 Tr. 51:15-53:13; Lewis Testimony, 10/31 Tr.110:4-13; Snellen Testimony, 11/2 Tr. 136:2-12; S. Smith Testimony, 11/15 Tr. 172:13-16.

6. Web Users' Privacy Concerns and Reluctance to Provide Personal Information

a. Web Users' Privacy Concerns

172. Requiring users to go through an age verification process would lead to a distinct loss of personal privacy. Many people wish to browse and access material privately and anonymously, especially if it is sexually

explicit. Web users are especially unlikely to provide a credit card or personal information to gain access to sensitive, personal, controversial, or stigmatized content on the Web. As a result of this desire to remain anonymous, many users who are not willing to access information non-anonymously will be deterred from accessing the desired information. Web site owners such as the plaintiffs will be deprived of the ability to provide this information to those users. Walsh Testimony, 10/23 Tr. 170:17-171:4; Tepper Testimony, 10/30 Tr. 178:7-23, 190:14-191:5, 212:1-10, 236:22-237:5, 238:9-239:17 (stating that anonymity is important for users with embarrassing medical and sexual questions which they would not even discuss with their mates or personal physicians); Corinna Testimony, 11/2 Tr. 103:23-104:12 (anonymity is particularly important to women seeking information about sexuality); A. Smith Testimony, 10/26 Tr. 188:24-189:10; Snellen Testimony, 11/2 Tr. 139:18-141:8, 156:8-17; Griscom Testimony, 10/23 Tr. 89:25-90:2; Pl. Ex. 54, at 372.

173. COPA's requirement that Web sites maintain the confidentiality of information submitted for purposes of age verification would not alleviate the deterrent effect of age verification on users, because users must still disclose the personal information to a Web site to pass through the screen, and then rely on these entities, many of whom are unknown and have no actual person identified with them, to comply with the confidentiality requirement. Tepper Testimony, 10/30 Tr. 238:9-239:17; Pl. Ex. 6, at 25 (noting that the "[c]ollection of individually-identifiable information at central points via this system poses privacy risks"); 47 U.S.C. § 231(d).

b. Web Users' Security Concerns

174. Requiring Internet users to provide payment card information or other personally identifiable information to access a Web site would significantly deter many users from entering the site, because Internet users are concerned about security on the Internet and because Internet users are afraid of fraud and identity theft on the Internet. S. Smith Testimony, 11/15 Tr. 116:4-6, 117:18-24; Walsh Testimony, 10/23 Tr. 171:15-172:9.

175. Although the Internet has become much more familiar to most people, numerous studies show that Internet users are concerned about identity theft and fraud on the Internet and that their fears have grown, not decreased, over time. S. Smith Testimony, 11/15 Tr. 119:11-15.

176. Consumer Reports Web Watch issued a report on Internet users' security concerns on October 26, 2005 which was based on a survey conducted by Princeton Survey Research Associates International, a reliable sources of information. S. Smith Testimony, 11/15 Tr. 119:20-120:12. The study found that nine out of ten U.S. Internet users over 18 years old have made changes to their behavior due to fear of identity theft including reducing Internet use and stopping or cutting back on making Internet purchases. S. Smith Testimony, 11/15 Tr. 120:13-121:16.

177. The Consumer Reports study also found that 88 percent of the people surveyed said that keeping personal information safe and secure is very important for a Web site they visit, and that for all online users, concern about identity theft is substantial and a worry that

has changed their behavior in sweeping ways. More specifically, because of their concerns, a majority of Internet users (53 percent) have stopped giving out personal information on the Internet. S. Smith Testimony, 11/15 Tr. 121:25-122:17, 124:14-18.

178. The Javelin company, a reliable source of information, issued a report on identity fraud in 2005. The Javelin study similarly found that there are growing fears today about identity theft on the Internet. S. Smith Testimony, 11/15 Tr. 124:19-125:5.

179. In April 2006, Forrester Research, a reliable source of information, issued a report which found that overall satisfaction with e-commerce shopping experiences and credit card security trust is declining, that credit card security concerns have intensified, and that whether founded on reality or not, all online shoppers, even experienced buyers, worry about credit card security. S. Smith Testimony, 11/15 Tr. 125:6-128:13.

180. In a study published in July 2003 and in an updated study published in Summer 2006 (after he submitted his expert report), defendant's expert, Dr. Smith, found that consumers have serious concerns about using credit cards on the Internet, in part, because of fear of theft or fraud. S. Smith Testimony, 11/15 Tr. 151:1-154:25, 158:24-160:13.

181. These two studies, along with many other studies discussed above, contradict Dr. Smith's opinion in this case that Internet users would not be significantly affected by having to provide credit card information to access free content on Web sites were COPA to go into effect. Moreover, Dr. Smith did not cite any evidence as to why his opinion had changed. S. Smith Testimony,

11/15 Tr. 118:7-20, 166:11-167:3. Therefore, I find Dr. Smith's testimony on this topic at trial to be unreliable.

J. Geolocation

182. Quova, Inc. provides IP intelligence services that allow online businesses to attempt to determine the location of users of their Web sites. Alexander Testimony, 11/13 Tr. 5:5-9.

183. A product that Quova markets can determine, within a 20 to 30 mile radius, the location from which a user is accessing a Web site through a proxy server, satellite connection, or large corporate proxy. Alexander Testimony, 11/13 Tr. 19:10-19, 28:2-7. The fact that Quova can only narrow down a user's location to a 20 to 30 mile radius results in Quova being unable to determine with 100 percent accuracy which side of a city or state border a user lives on if the user lives close to city or state borders. Alexander Testimony, 11/13 Tr. 28:8-16.

184. If a visitor is accessing a Web site through AOL, Quova can only determine whether the person is on the East or West coast of the United States. Alexander Testimony, 11/13 Tr. 20:20-21:3.

185. Quova has been used by Web site operators to direct traffic so that only users in the United States can view products that can only be distributed in the United States and to customize content for users in the United States as opposed to users in a another country. Alexander Testimony, 11/13 Tr. 22:11-24:11.

186. The services Quova offers can cost anywhere from $6,000 to $500,000 a year. Alexander Testimony, 11/13 Tr. 24:12-20.

IV. CONCLUSIONS OF LAW[4]

A. Standing

1. In order to maintain standing, the plaintiffs must show, *inter alia*, that they have sustained or are immediately in danger of sustaining some direct injury that is not abstract, conjectural or hypothetical. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983). In a pre-enforcement challenge to a statute carrying criminal penalties, standing exists when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979); *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392-93 (1988).

2. Because all of the plaintiffs in this case seek the same injunctive relief, if the court concludes that one of the plaintiffs has standing, it is unnecessary to determine the standing of the remaining plaintiffs. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 330 (1999) (finding that the presence of one party with standing assures that controversy before the Court is justiciable); *see Sec. of the Interior v. California*, 464 U.S. 312, 319 n. 3 (1984); *Babbitt*, 442 U.S. at 299, n. 11.

3. As this court has found previously and today, and as the Third Circuit observed, there is nothing in the language of COPA which limits its reach to commer-

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[4] To the extent that the following Conclusions of Law include Findings of Fact or mixed Findings of Fact and Conclusions of Law, those Findings and Conclusions are hereby adopted by this court.

cial pornographers.[5] *ACLU*, 322 F.3d at 256 (citing 31 F. Supp. 2d at 480); 47 U.S.C. § 231.

4. I conclude that under COPA, the terms "commercial purposes" and "engaged in the business" are defined very broadly and include within their reach Web sites which only receive revenue from advertising or which generate profit for their owners only indirectly.[6] 47 U.S.C. § 231(e)(2)(A) & (B). Again this conclusion is in accord with an insight by the Third Circuit in ruling on the efficacy of the 1999 preliminary injunction. *ACLU*, 322 F.3d at 256 (observing that these definitions expand "COPA's reach beyond those enterprises that sell services or goods to consumers" to include "those persons who sell advertising space on their otherwise noncommercial Web sites").

5. Based upon Findings of Fact 16 through 18, 21, 26, and 41 though 58, Corinna, Nerve, and Salon engage in communications on the Web for commercial purposes

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[5] Like Congress and both parties, I will not attempt to define "commercial pornographer." Such a definition is not necessary to this adjudication, however, as: (1) COPA clearly covers far more speakers on the Web than those who might be defined as commercial pornographers; and (2) defendant contends and, thus, admits that the plaintiffs are not commercial pornographers. *see* Conclusions of Law 3, 4, 9, 39, 41, 52; Doc. No. 429, Def.'s Proposed Finding of Fact 11.

[6] For example, Barbara DeGenevieve ("DeGenevieve"), a tenured professor at the School of the Art Institute in Chicago, uses her Web site to generate profit even though all of her work on her Web site is free to view, she does not sell anything directly on her Web site, and she does not provide advertising space. Instead, DeGenevieve's Web site gives others the opportunity to contact her in order to purchase copies of her work or engage her to give lectures or workshops, which is a common way to do business in her academic field. DeGenevieve Testimony, 11/1 Tr. 25:18-27:9, 31:14-24, 42:22-43:3, 61:22-66:7.

and have content which an average person utilizing contemporary community standards could find was designed to appeal to or pander to the prurient interest of minors and depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast. *See* 47 U.S.C. § 231(e)(6). The same content of these three plaintiffs could also be found by a reasonable person to include content that lacks serious literary, artistic, political, or scientific value for minors. *See* 47 U.S.C. § 231(e)(6). Therefore, this case is justiciable as a credible threat of prosecution exists and at least these three plaintiffs have standing. *See Babbitt*, 442 U.S. at 298.[7]

B. **Strict Scrutiny Applies to this Action**

6. There is no doubt that COPA restricts speech based upon its content. *See* 47 U.S.C. § 231; *Ashcroft*, 542 U.S. at 660. Therefore strict scrutiny applies to the

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[7] As stated previously, under COPA, the relevant inquiry relies on whether an *average person*, utilizing community standards would find that the material was: (1) as a whole, designed to appeal to the prurient interest of minors; (2) depicts sexual acts or contact or certain proscribed nudity that is patently offensive to minors; and (3) whether *a reasonable person* would find that the content as a whole lacked certain types of value for minors. 47 U.S.C. § 231(e)(6); *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987) (stating that under the *Miller* test for obscenity, in determining whether a given work has value, the proper inquiry is "whether a reasonable person would find such value in the material, taken as a whole"). As a result, because the plaintiffs' subjective beliefs are unimportant to the statutory analysis, it does not matter whether the plaintiffs themselves believe that their content is harmful to minors as such beliefs are irrelevant.

claims in this action.[8] *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Such regulations are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

7. Because COPA suppresses a large amount of speech that adults have a constitutional right to receive, under the strict scrutiny standard, COPA may only be upheld as constitutional if defendant meets his burden of proving that COPA is narrowly tailored to the compelling interest that COPA was enacted to serve and there are no less restrictive alternatives that would be at least as effective in achieving that interest. *Ashcroft*, 542 U.S. at 665 (citing *Reno*, 521 U.S. at 874).

8. There has never been any question that the interest espoused by Congress, as related to this court by defendant of "protecting minors from exposure to sexually explicit material on the World Wide Web" is a com-

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[8] Defendant's contention that COPA regulates only commercial speech and, thus, should be analyzed under the less exacting standard for such speech is utterly meritless. If accepting advertising or selling subscriptions transformed speech into commercial speech, the First Amendment protections afforded to many modes of communication, including print, would be completely destroyed. *See e.g. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience"); *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (stating that commercial speech "relates to a particular product or service"); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-762 (1976) (recognizing that speech receives full First Amendment protection "even though it is carried in a form that is sold for profit" or "even though it may involve a solicitation to purchase or otherwise pay or contribute money" and defining commercial speech as speech that does "no more than propose a commercial transaction") (internal quotation marks omitted).

pelling interest. *Reno*, 521 U.S. at 869-870 (stating that "'there is a compelling interest in protecting the physical and psychological well-being of minors' which extended to shielding them from indecent messages that are not obscene by adult standards") (quoting *Sable*, 492 US. at 126).

C. **Defendant Has Failed to Meet His Burden of Proof**

1. **Defendant Has Failed to Show that COPA Is Narrowly Tailored to Congress' Compelling Interest**

a. COPA Is Overinclusive

9. COPA is overinclusive. *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991) (finding that laws which are "significantly overinclusive" are not narrowly tailored). Due to the broad definitions and provisions of COPA, COPA prohibits much more speech than is necessary to further Congress' compelling interest. 47 U.S.C. § 231. For example, as discussed above in Conclusions of Law 3 and 4, the definitions of "commercial purposes" and "engaged in the business" apply to an inordinate amount of Internet speech and certainly cover more than just commercial pornographers, contrary to the claim of defendant. Moreover, as discussed below in Conclusions of Law 42 and 49, the fact that COPA applies to speech that is obscene as to all minors from newborns to age sixteen, and not just to speech that is obscene as to older minors, also renders COPA over-inclusive. *See ACLU*, 322 F.3d at 253-254 (noting that the term "minor" in COPA applies to "an infant, a five-year old, or a person just shy of age seventeen").

b. COPA Is Underinclusive

10. COPA is also underinclusive. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 232 (1987) (finding the statutory provision at issue unconstitutional because it was "both overinclusive and underinclusive"). For example, as shown in Findings of Fact 63, 65, and 66, there is a significant amount of sexually explicit material on the Internet which originates from outside of the United States. As discussed below, unlike Internet content filters which are able to block from view unsuitable material regardless of its origin (*see* Finding of Fact 80), COPA has no extra-territorial application. *See also* Finding of Fact 131 and Pl. Ex. 55, at 3 (the Department of Justice concluding that COPA "apparently would not attempt to address", *inter alia*, sexually explicit overseas Web sites and that "any attempt to regulate overseas web sites would raise difficult questions regarding extraterritorial enforcement"); Pl. Ex. 54, at 235 (The NRC concluding that because a substantial percentage of sexually explicit Web sites exist outside the United States, even strict enforcement of COPA will likely have only a marginal effect on the availability of such material on the Internet in the United States). As a result, and as is more fully discussed below, COPA is not applicable to a large amount of material that is unsuitable for children which originates overseas but is nevertheless available to children in the United States.

11. Statutes are presumed to only have domestic effect unless a contrary intent appears. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). Although, COPA claims to prohibit the transmission of material that is harmful to minors "in interstate or foreign commerce", 47 U.S.C. § 231(a)(1), such language is legally insuffi-

cient to demonstrate Congress' clear intent that COPA applies to Web sites hosted or registered outside of the United States. *See E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 251 (1991) (*superceded by statute on the issue of retroactive application*) (finding that the Supreme Court has "repeatedly held that even statutes that contain broad language in their definitions of 'commerce' that expressly refer to 'foreign commerce' do not apply abroad") (citing *New York Cent. R. Co. v. Chisholm*, 268 U.S. 29, 45 (1925) and *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)); *U.S. v. Reeves*, 62 M.J. 88 (C.A.A.F. 2005) (applying the presumption against extraterritoriality to a statute that prohibited conduct "in interstate or foreign commerce").

12. Defendant contends that there is precedent for reading into a criminal statute extraterritorial application where a statute does not expressly provide for such. *See U.S. v. Harvey*, 2 F.3d 1318 (3d Cir. 1993). However, because COPA has both civil and criminal penalties, and because of the lack of Congressional intent, the court will not read into COPA implied extraterritorial application. *Smith v. U.S.*, 507 U.S. 197, 203-204 (1993) (stating that "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States") (internal quotation marks omitted).

13. As shown in Finding of Fact 130, the legislative history of COPA does not support a finding that Congress intended for COPA to apply to Web sites that are hosted or registered outside of the United States and instead shows that Congress intended for the statute to

have only domestic application. *See also* H.R. Rep. 105-775, at *20.

14. If Congress had intended for COPA to have extraterritorial application, it could have inserted appropriate language in the statute. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989) (remarking that "Congress knows how to place the high seas within the jurisdictional reach of a statute").

15. Enforcement of COPA against overseas Web site owners would also be burdensome and impractical due to the knotty questions of jurisdiction which arise in the Internet context. *See e.g. Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997). Furthermore, even if a specific foreign Web site had sufficient contacts with the forum to allow personal jurisdiction, it could be quite difficult or impossible to ensure that the offender would obey or could be forced to obey the judgment of the U.S. court. As a result, COPA's lack of extraterritorial application renders it underinclusive.

16. As demonstrated in Finding of Fact 126, it is also accurate that COPA only concerns itself with material that is accessible over the Internet using HTTP or a successor protocol. *See also* 47 U.S.C. § 231(e)(1). As advocated by the plaintiffs, it appears that this is yet another reason why COPA is underinclusive. However, as discussed below in Conclusions of Law 35 and 36, the compelling interest of Congress, as submitted by defendant, is quite narrow in that it seeks only to protect children form harmful materials on the *Web*. Therefore, I will restrict my analysis to materials available on the Web and will not consider the ramifications of COPA's

failure to reach other harmful materials on the Internet accessible by means other than the Web.

c. The Affirmative Defenses in COPA Do Not Aid in Narrowly Tailoring It to Congress' Compelling Interest

17. The affirmative defenses cannot cure COPA's failure to be narrowly tailored because they are effectively unavailable. Credit cards, debit accounts, adult access codes, and adult personal identification numbers do not in fact verify age. As a result, their use does not, "in good faith," "restrict[] access" by minors. 47 U.S.C. § 231(c)(1)(A); *See* Findings of Fact 137, 138, 140-147, 148-158, 159-160.

18. As shown by Findings of Fact 138 and 140 through 147, because payment card issuers prohibit the use of their credit or debit cards to verify age and because a significant number of minors have access to payment cards, such cards are not an effective age verification device.

19. The Commerce Committee's reliance on *Sable* was misplaced as the Court in *Sable* neither approved nor disapproved of credit card age verification and the other defenses listed in the FCC dial-a-porn regulations for 47 U.S.C. §§ 223(b)-(c). Findings of Fact 135, 136. Moreover, the evidence presented in this case is contrary to the findings of the Second Circuit in *Dial Information Services*, 938 F.2d 1535, and, thus, I do not find that case persuasive. *See* Conclusion of Law 18. Further distinguishing this case from *Dial Information Services* is that 47 U.S.C. § 223(b) was designed to specifically combat commercial dial-a-porn, *see Sable* 492 U.S. at 120, while the range of speech restricted in COPA is

much wider and effects even those noncommercial Web sites which garner profit for their owners only through advertising or other indirect means. *See* Conclusions of Law 3, 4. Instead, I agree with the Fourth Circuit in *PSINet, Inc. v. Chapman*, 362 F.3d 227 (4th Cir. 2004). In *PSInet*, the Fourth Circuit found the Virginia Internet harmful-to-minors law overly broad and not narrowly tailored. 362 F.3d at 239. In its analysis the court noted, in regards to the government's suggestion that the use of PIN numbers for access to Web pages would provide an adequate affirmative defense, that "the Commonwealth would certainly not agree that a liquor or tobacco store that sold to anyone with a valid credit card number, without some additional step to ascertain the age of the customer, was taking reasonable steps to exclude juveniles from the purchase of age prohibitive products." *Id.* at 236. The Fourth Circuit also found that since some adults do not have credit cards and some would be unwilling to provide a credit card number online, requiring a credit card to access a site would "unduly burden protected speech in violation of the First Amendment" and that "requiring adult Web sites to utilize PIN numbers would unconstitutionally chill free speech." *Id.* at 236-37. I find the reasoning of the Fourth Circuit persuasive.

20. As demonstrated by Findings of Fact 138 and 148 through 158, because there are no DVS products that actually verify age but merely verify data, sometimes with as little as a name and address, DVS products are not effective age verification services.

21. The affirmative defenses also raise their own First Amendment concerns. For example, the utilization of those devices to trigger COPA's affirmative de-

fenses will deter listeners, many of whom will be unwilling to reveal personal and financial information in order to access content and, thus, will chill speech. *See Denver Area Educ. Telecomms. Consortium, Inc. v FCC*, 518 U.S. 727, 754 (1996) (striking down an identification requirement because it would "further restrict viewing by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the 'patently offensive' channel"); Findings of Fact 171, 172-181.

22. Similarly, the affirmative defenses also impermissibly burden Web site operators with demonstrating that their speech is lawful. *See Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002) (stating that "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful"); *ACLU*, 322 F.3d at 260 (noting that "the affirmative defenses [in COPA] do not provide the Web publishers with assurances of freedom from prosecution"). Under the COPA regime, Web site operators are unable to defend themselves until after they are prosecuted. *See* 47 U.S.C. § 231(c).

23. Moreover, the affirmative defenses place substantial economic burdens on the exercise of protected speech because all of them involve significant cost and the loss of Web site visitors, especially to those plaintiffs who provide their content for free. *See Simon & Schuster, Inc.*, 502 U.S. at 115 (stating that "A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech"); Findings of Fact 161-163, 165-171. Defendant's response to this proposition, that the defenses are not burdensome to commercial pornogra-

phers because they already accept credit cards to sell their content, shows his fundamental misunderstanding of the reach of COPA: COPA does not apply merely to commercial pornographers but to a wide range of speakers on the Web. *See* Conclusions of Law 3, 4.

24. Based upon Finding of Fact 164, Bitpass is not a reasonable solution to the problem faced by Web site owners who provide their content for free but who cannot accept zero-dollar transactions on credit cards.

25. As shown above, the affirmative defenses in COPA raise unique First Amendment issues and, in any event, do not aid in narrowly tailoring COPA to Congress' compelling interest.

2. Defendant Has Failed to Show that COPA Is the Least Restrictive Alternative for Advancing Congress' Compelling Interest

26. Defendant has failed to successfully defend against the plaintiffs' assertion that filter software and the Government's promotion and support thereof is a less restrictive alternative to COPA. The Supreme Court recognized, upon the evidence before it at the time of the issuance of the preliminary injunction in 1999, that:

> Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms

> simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Ashcroft, 542 U.S. at 667. The evidence at trial shows that this is still the case today. It remains true, for example, that unlike COPA there are no fines or prison sentences associated with filters which would chill speech. 47 U.S.C. § 231(a). Also unlike COPA, as shown by Findings of Fact 68, 78, and 79, filters are fully customizable and may be set for different ages and for different categorizes of speech or may be disabled altogether for adult use. As a result, filters are less restrictive than COPA.

27. Moreover, defendant contends that: (1) filters currently exist and, thus, cannot be considered a less restrictive alternative to COPA; and that (2) the private use of filters cannot be deemed a less restrictive alternative to COPA because it is not an alternative which the government can implement. These contentions have been squarely rejected by the Supreme Court in ruling upon the efficacy of the 1999 preliminary injunction by this court. The Supreme Court wrote:

> Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. It could also take steps to promote their development by industry, and their use by parents. It is incorrect, for that reason, to say that filters are

> part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. In enacting COPA, Congress said its goal was to prevent the "widespread availability of the Internet" from providing "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control." COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.

Ashcroft, 542 U.S. at 669-670 (internal citation omitted). I agree with the Supreme Court and conclude today that the mere fact that filters currently exist does not indicate that they cannot be a less restrictive or effective alternative to COPA nor does it make them part of the regulatory status quo. I also agree and conclude that in conjunction with the private use of filters, the government may promote and support their use by, for example, providing further education and training programs to parents and caregivers, giving incentives or mandates to ISP's to provide filters to their subscribers, directing the developers of computer operating systems to provide filters and parental controls as a part of their products (Microsoft's new operating system, Vista, now provides such features, *see* Finding of Fact 91), subsidizing the purchase of filters for those who cannot afford them, and by performing further studies and recommendations regarding filters.

3. Defendant Has Failed to Show that Other Alternatives Are Not at Least as Effective as COPA

28. Defendant has also failed to show that filters are not at least as effective as COPA at protecting minors from harmful material on the Web. The first hurdle in this analysis is that there is no showing of how effective COPA will be. However, the evidence shows that at a minimum, COPA will not reach a substantial amount of foreign source sexually explicit materials on the Web, which filters will reach. Findings of Fact 63, 65, 66 and Conclusions of Law 10-14.

29. COPA will also not be effective because its affirmative defenses including the age verification schemes are not effective. *See* Conclusions of Law 17-25.

30. Moreover, based on the recent sparse enforcement history of the obscenity laws detailed in Findings of Fact 132 and 133 and the concern of the Department of Justice that COPA "could require an undesirable diversion of critical investigative and prosecutorial resources that the Department currently invests in . . . prosecuting . . . large-scale and multi district commercial distributors of obscene materials", Pl. Ex. 55; Finding of Fact 131, it is unlikely that COPA will be widely enforced, thus further limiting its effectiveness.

31. The Supreme Court recognized that, on the record before them at the time, filters were "likely more effective as a means of restricting children's access to materials harmful to them." *Ashcroft*, 542 U.S. at 667. I conclude that the evidence in this case now confirms the Supreme Court's prediction.

32. Although filters are not perfect and are prone to some over and under blocking, the evidence shows that they are at least as effective, and in fact, are more effective than COPA in furthering Congress' stated goal for a variety of reasons. For example, as shown by Findings of Fact 68, 78 through 80, 87 through 91, and 92 through 99, filters block sexually explicit foreign material on the Web, parents can customize filter settings depending on the ages of their children and what type of content they find objectionable, and filters are fairly easy to install and use. *See also* Findings of Fact 102-109.

33. Reliable studies also show that filters are very effective at blocking potentially harmful sexually explicit materials. Findings of Fact 110-116.

34. Even defendant's own study shows that all but the worst performing filters are far more effective than COPA would be at protecting children from sexually explicit material on the Web, garnering percentages as high as nearly 99 percent in successfully blocking such material. Findings of Fact 117-121. As a result of Conclusions of law 28 through 34, it is clear that defendant has failed to establish that COPA is the least restrictive means of protecting children from harmful sexually explicit materials on the Web.

35. As discussed briefly above in Conclusion of Law 16, there are also several other factors which technically make filters more effective than COPA at protecting children from harmful materials on the Internet. For example, filters cover many formats other than HTTP and filters can block content from a host of Internet applications. Findings of Fact 76, 77,

82. COPA specifically does not cover any of these items as it is limited only to materials found on the Web via HTTP or a successor protocol. Findings of Fact 126-127. The plaintiffs allege that as a result, COPA ignores a substantial amount of Internet speech which could be deemed harmful to minors. This contention is technically correct, however for reasons stated below, it was not considered in my analysis. Defendant claims that COPA's limitations were added to the statute as a direct result of the Supreme Court's prior holding that the CDA was overbroad in part because it was not limited to commercial speech and it covered a wide array of Internet speech other than simply that found on the Web.[9] Defendant's contention is also correct. Findings of Fact 125-129. This creates an interesting conundrum for defendant where broadening COPA's reach would likely make it overbroad, but by narrowing its reach to HTTP or successor protocols, Congress has made COPA underinclusive and less effective than filters.

36. However, the compelling interest of Congress, as described to this court by defendant, is very narrow: to protect children from sexually explicit material on the *Web*. Although Congress' stated interest is listed more generally in the Congressional Findings as "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful

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[9] The plaintiffs likewise contend that COPA is underinclusive and less effective than filters because it is limited to commercial speech. However, as shown above in Conclusions of Law 3 and 4, COPA is not actually limited to commercial speech as its reach is sufficiently broad to cover virtually every Web site which has sexually explicit materials. I conclude that the commercial restriction in COPA is nearly a nullity and, thus, no restriction at all. As a result, I will not consider the plaintiffs' argument regarding COPA's commercial limitations.

to them", it is clear from the rest of the Findings that harmful material on the Web was Congress' true concern. Finding of Fact 124; H.R. Rep. 105-775, at *2 (discussing minors access to materials on the Web that can frustrate parental supervision or control and stating that past efforts have not provided a national solution to the problem of minors accessing harmful material on the Web). Therefore, I accept defendant's narrow interpretation of the compelling interest of Congress. I also recognize that Congress may legislate in stages and that "reform may take one step at a time, addressing itself to the phase of the problem that seem most acute to the legislative mind." *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 207-08 (2003). For this reason, and because it is clear that COPA is less effective than filters even without this additional contention, I have restricted my analysis to harmful materials available on the Web (and not beyond), which makes these other factors irrelevant to my decision.

D. Vagueness and Overbreadth

37. Facial challenges to legislation are "employed by the Court sparingly and only as a last resort."[10] *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1974)). To prevail on their facial challenge to COPA, the plaintiffs must "demonstrate a substantial

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[10] Although facial challenges should be avoided and the holding here is merely supplemental, addressing vagueness and overbreadth in regards to COPA is very important to the facilitation of any subsequent legislation in this area, since Congress clearly relied on the Supreme Court's vagueness and overbreadth analyses of the CDA in drafting COPA. *See* 535 U.S. at 569-70; *ACLU*, 322 F.3d at 244-45.

risk that application of the provision will lead to suppression of speech." *Id.*

1. COPA Is Vague

38. The vagueness doctrine was created to ensure fair notice and nondiscriminatory application of the laws. *U.S. v. Tykarsky*, 446 F.3d 458, 472 n.9 (3d Cir. 2006). A statute or regulation fails for vagueness if men of ordinary intelligence must speculate as to the meaning of what the statute or regulation requires or prohibits. *See Gibson v. Mayor & Council of Wilmington*, 355 F.3d 215, 225 (3d Cir. 2004).

39. A party cannot bring a facial vagueness claim if the challenged regulation clearly applies to that party's speech. *Gibson*, 355 F.3d at 225; *Rode v. Dellarciprete*, 845 F.2d 1195, 1200 (3d Cir. 1988). Here, Congress intended COPA to apply only to commercial pornographers as demonstrated by Findings of Fact 122, 123, 128, and 129 and Conclusions of Law 3 and 4. However, the plaintiffs in this action are not commercial pornographers, a fact which has not escaped defendant's notice in his challenges to their standing. Therefore, because COPA does not clearly apply to the plaintiffs' speech, the plaintiffs may bring a facial vagueness claim.

40. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." *Russollo v. U.S.*, 464 U.S. 16, 23 (1983) (quoting *U.S. v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). In contrast to the scienter requirement of "knowingly and with knowledge of the character of the material" found in 47 U.S.C.

§ 231(a)(1), the term "intentionally" is used in 47 U.S.C. § 231(a)(2). This court must assume that Congress intended the disparate use of "knowingly and with knowledge of the character of the material" and "intentionally" in 47 U.S.C. § 231(a)(1)-(2). However, since neither term is defined, the difference in scienter standards creates uncertainty in COPA's application and renders the terms vague.[11] The chilling effect created by this uncertainty is exacerbated by the fact that violations of both of the standards could result in criminal proceedings and violations of the intentional standard could result in a fine of up to $50,000 a day. *See* 47 U.S.C. § 231(a)(1)-(2).

41. Although Findings of Fact 122, 123, 128, and 129 demonstrate that Congress intended COPA to apply solely to commercial pornographers, as discussed previously in Conclusions of Law 3 and 4, the phrase "communication for commercial purposes", as it is modified by the phrase "engaged in the business", does not limit COPA's application to commercial pornographers. *See ACLU*, 322 F.3d at 256 (citing 31 F. Supp. 2d at 480). The lack of clarity in these phrases results in Web sites, which only receive revenue from advertising or which generate profit for their owners only indirectly, from being included in COPA's reach. Conclusion of Law 4. Since the enforcement of COPA could result in prosecution of the plaintiffs in this case, it is reasonable for the plaintiffs to fear prosecution under COPA. *See e.g.* Findings of Fact 14, 41, 46-61; Conclusion of Law 5. The

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[11] The court notes that the Department of Justice contended in a 1998 letter that the lack of clarity created by the use of these two terms was one of ten "confusing or troubling ambiguities" in COPA. Pl. Ex. 55; Finding of Fact 131.

uncertainty resultant from the vagueness of "communication for commercial purposes" would cause the plaintiffs' speech to be chilled or self censored, as demonstrated by Findings of Fact 50, 54, and 57 through 61.

42. As noted above, COPA defines a minor as "any person under 17 years of age." 47 U.S.C. § 231(e)(7). Although the government argues that the term minor should be interpreted to mean an older minor[12] as the Third Circuit noted, such an interpretation would be "in complete disregard of the text" of COPA. *ACLU*, 322 F.3d at 253. As discussed by the Third Circuit, defining minors as "any person under 17 years of age," creates a serious issue with interpretation of COPA since no one could argue that materials that have "serious literary, artistic, political, or scientific value" for a sixteen-year-old would necessarily have the same value for a three-year old. *Id.* at 253-54. Likewise, what would be "patently offensive" to an eight-year-old would logically encompass a broader spectrum of what is available on the Web than what would be considered "patently offensive"

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[12] As the Third Circuit found, the cases cited by defendant in support of his argument are inapposite. *ACLU*, 322 F.3d at 254 n.16. I agree. The Eleventh Circuit's interpretation in *American Booksellers v. Webb* of the Supreme Court's use of the "reasonable person" standard in *Pope*, 481 U.S. at 500-01 does not logically follow the holding in *Pope*, since nothing in *Pope* implies that where a reasonable minor standard is employed, that the reasonable minor should be considered an older reasonable minor. *See ACLU*, 322 F.3d at 254 n.16; *Am. Booksellers v. Webb*, 919 F.2d 1493, 1508-09 (11th Cir. 1990). Additionally, the decisions of the Tennessee and Virginia Supreme Courts to apply an older minor standard to state statutes for minors are not binding on this Court. *See ACLU*, 322 F.3d at 254 n.16; *Davis-Kidd Booksellers, Inc. v. McWhereter*, 866 S.W.2d 520, 527 (Tenn. 1993); *Am. Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127 (4th Cir. 1989).

for a sixteen-year-old. Presumably no material covered by COPA would be "designed to appeal to, or [be] designed to pander to, the prurient interest" of a two or four-year old. *Id.*, at 254. As the Third Circuit noted, "[i]n abiding by this definition, Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these 'minors' should be considered in deciding the particular content of their Internet postings." *Id.* Thus, the application of the definition of minors to COPA creates vagueness in the statute.

43. I recognize that state laws prohibiting obscene-as-to-minors material have been upheld by the Supreme Court with no discussion of whether they apply to minors of every age or only to older minors. *See e.g. Ginsberg v. State of N. Y.*, 390 U.S. 629 (1968). In a store, the cashier can easily discern if a patron is 10 or 11 years old instead of a claimed age of 17. The same cashier, however, may have trouble discerning whether a patron is 16 years old or 17 years old without some form of photographic identification. Thus, with laws that are concerned with face-to-face transactions, in reality it is only those borderline cases in which a minor is close to the age of majority that are at issue. *See e.g. Id.* at 631 (wherein the patron at issue was 16 years old). As a result, in the pre-Internet age, it was not completely necessary to be more specific in delineating what was obscene as to minors of various age groups. However, on the Internet, everyone is faceless and fairly anonymous and, thus, the context is radically changed. The Internet merchant has no viable method of determining whether an individual is 6, 12, 17 or 51 years old. Consequently, we are presented with this novel problem where a gen-

eral prohibition on materials obscene as to minors creates a vagueness in the context of Internet transactions that is lacking in other situations.

44. COPA does not define the term "as a whole" and the plain language of the statute does not lend itself to a obvious definition of "as a whole" as it might be applied to the Internet. 47 U.S.C. § 231. The Third Circuit concluded in a dictum that the language of COPA clearly demonstrated that each individual "communication, picture, image, graphic image file, article, recording, writing or other matter of any kind" should be considered without context. *ACLU*, 322 F.3d at 252. But, as Justice Breyer noted in his dissent, "as a whole" has been traditionally interpreted in obscenity cases to require an examination of the challenged material within the context of the book or magazine in which it is contained. *Ashcroft*, 542 U.S. at 681 (citing *Roth v. U.S.*, 354 U.S. 476, 490 (1957)). As Justice Kennedy noted in his concurring opinion, "The notion of judging work as a whole is familiar in other media, but more difficult to define on the World Wide Web. It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." 535 U.S. at 592-93. Thus, with the disparate views noted above, and as discussed below, in the context of the Web, I conclude that the use in COPA of the phrase "as a whole" without any further definition, is vague.

45. There is no question that a printed book or magazine is finite, and, as a result, it is very easy to discern what needs to be examined in order to make an "as a whole" evaluation. The same is not true for a Web page or Web site since Web pages and sites are hyper-

linked to other Web pages and sites. As demonstrated by online magazines such as Nerve and Salon, even the Web sites for online magazines, without considering the hyperlinks to off-site materials, have greater depth and breadth than their counterpart in print. *See* Findings of Fact 3, 21, 26. Instead of having a two-hundred page book or an issue of a magazine to look to for context, COPA invokes some undefined portion of the vast expanse of the Web to provide context for material allegedly violating the statute. As a result, a Web publisher cannot determine what could be considered context by a fact finder, prosecutor, or court, and therein lies the source of the vagueness.

46. The vagueness of COPA, like the vagueness of CDA, is especially concerning since they are both content-based regulations. *See Reno*, 521 U.S. at 871-72. "An impermissible chill is created when one is deterred from engaging in protected activity by the existence of a governmental regulation or the threat of prosecution thereunder." *Aiello v. City of Wilmington*, 623 F.2d 845, 857 (3d Cir. 1980). The plaintiffs have demonstrated, as recounted in Factual Findings 50, 54, and 57 through 61, that COPA has a chilling effect on free speech. The fact that Web publishers are faced with criminal prosecution for an alleged violation of COPA only serves to exacerbate the chilling effect resultant from the vagueness of the terms employed in COPA. *See Reno*, 521 U.S. at 872. Thus, I conclude that COPA is clearly unconstitutionally vague.

2. COPA Is Overbroad

47. "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substan-

tial amount of protected speech is prohibited or chilled in the process." *Free Speech Coalition*, 535 U.S. at 255. The Supreme Court has noted that, "the possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted." *Broadrick*, 413 U.S. at 612.

48. Since the vagueness of "communication for commercial purposes" and "engaged in business" would allow prosecutors to use COPA against not only Web publishers with commercial Web sites who seek profit as their primary objective but also those Web publishers who receive revenue through advertising or indirectly in some other manner, the array of Web sites to which COPA could be applied is quite extensive. Such a widespread application of COPA would prohibit and undoubtably chill a substantial amount of constitutionally protected speech for adults.

49. As discussed above, because a story that might have "serious literary value" for a sixteen-year-old could be considered to appeal to the "prurient interest" of an eight-year-old and be "patently offensive" and without "serious value" to that child, Web publishers do not have fair notice regarding what they can place on the Web that will not be considered harmful to "any person under 17 years of age." As the Third Circuit stated in ruling on the efficacy of the 1999 preliminary injunction by this court, "[b]ecause COPA's definition of 'minor' therefore broadens the reach of 'material that is harmful to minors' under the statute to encompass a vast array of speech that is clearly protected for adults . . . the definition renders COPA significantly overinclusive." *ACLU*, 322 F.3d at 268.

50. As demonstrated by Conclusions of Law 17 through 25 and as noted by the Third Circuit, the affirmative defenses in COPA do not prevent it from sweeping too broadly since they do not verify age, impose additional burdens, and add to the statute's chilling effect. *See ACLU*, 322 F.3d at 268.

51. "When a federal court is dealing with a federal statute challenged as being overly broad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction." *New York v. Ferber*, 458 U.S. 747, 769 n.24 (1982). If the statute is not subject to a limiting construction but can be severed so that a constitutional part remains, the statute should be severed accordingly. *Id.* However, a law should not be rewritten by a court so that it can pass constitutional muster. *Am. Booksellers Ass'n*, 484 U.S. at 397.

52. Nothing in the statute references commercial pornographers, for whom the statute was apparently intended, as demonstrated by Findings of Fact 122, 123, 128, and 129 and Conclusions of Law 3 and 4. To read such a limitation into the statute would result in an impermissible rewriting of the statute and assumption of the role of the legislature by this court. The term "minor" is clearly not subject to a narrowing construction, because, as noted by the Third Circuit, acting as if COPA only applied to older minors would be "in complete disregard of the text" of COPA. *ACLU*, 322 F.3d at 253. There is no portion of the statute that could be severed to satisfy the First Amendment since the terms "commercial purposes" and "minor" cannot be removed

and leave a viable statute. Thus, I conclude that COPA is unconstitutional as a result of its overbreadth.[13]

V. CONCLUSIONS

I agree with Congress that its goal of protecting children from sexually explicit materials on the Web deemed harmful to them is especially crucial. This court, along with a broad spectrum of the population across the country yearn for a solution which would protect children from such material with 100 percent effectiveness. However, I am acutely aware of my charge under the law to uphold the principles found in our nation's Constitution and their enforcement throughout the years by the Supreme Court. I may not turn a blind eye to the law in order to attempt to satisfy my urge to protect this nation's youth by upholding a flawed statute, especially when a more effective and less restrictive alternative is readily available (although I do recognize that filters are neither a panacea nor necessarily found to be the ultimate solution to the problem at hand). My feelings resonate with the words of Justice Kennedy, who faced a similar dilemma when the Supreme Court

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[13] Findings of Fact 182 through 186 show that technology related to limiting access to Web sites based on the geographic location of the user has progressed since the preliminary injunction was issued by this court in 1999. But, these same Findings also establish that this technology is far from perfect and cost prohibitive for many Web site operators that could be subject to COPA. *See* 31 F. Supp. 2d at 484. Such technology is relevant in addressing how "community standards" in the definition of harmful to minors applies to the Internet which does not lend itself easily to geographic constraints. 47 U.S.C. § 231(e)(6). However, since this court's overbreadth holding is only supplemental and the additional analysis of the thorny "community standards" question would merely serve to unnecessarily complicate this adjudication, I will not reach the issue.

struck down a statute that criminalized the burning of the American flag:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Texas v. Johnson, 491 U.S. 397, 420-421 (1989) (Kennedy, J. concurring). Despite my personal regret at having to set aside yet another attempt to protect our children from harmful material, I restate today, as I stated when granting the preliminary injunction in this case, that "I without hesitation acknowledge the duty imposed on the Court [as Justice Kennedy observed] and the greater good such duty serves. Indeed, perhaps we do the minors of this country harm if First Amendment protections, which they will with age inherit fully, are chipped away in the name of their protection." 31 F. Supp. 2d at 498.

For the forgoing reasons, I conclude that COPA facially violates the First and Fifth Amendment rights of the plaintiffs because: (1) COPA is not narrowly tailored to the compelling interest of Congress; (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and (3) COPA

is impermissibly vague and overbroad.[14] Therefore, I will enter a permanent injunction against the enforcement of COPA.

An appropriate Order follows.

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[14] As a result, it is unnecessary to address the plaintiffs' other claims that COPA interferes with the First and Fifth Amendment rights of older minors to access and view sexually explicit material that is not harmful to them and that COPA violates the First and Fifth Amendment right to communicate and access information anonymously. *Superintendent, Massachusetts. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 453 (1985) (noting "the rule of judicial restraint requiring [courts] to avoid unnecessary resolution of constitutional issues").

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 98-5591

AMERICAN CIVIL LIBERTIES UNION, ET AL.

v.

ALBERTO R. GONZALES IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES

ORDER

AND NOW, this 22nd day of March, 2007, upon consideration of the evidence, testimony of the witnesses and experts, and the arguments of counsel presented during the trial of this matter and the pre and post-trial submissions by the parties (*see* Doc. Nos. 319, 342, 343, 430, 429), it is hereby **ORDERED**, that based upon the Findings of Fact and Conclusions of Law detailed above:

(1) The Child Online Protection Act, 47 U.S.C. § 231, is facially violative of the First and Fifth Amendments of the United States Constitution; and

(2) Defendant Alberto R. Gonzales, in his official capacity as Attorney General of the United States, and his officers, agents, employees, and attorneys, and those persons in active concert or participation with defendant who receive actual notice of this Order are **PERMANENTLY ENJOINED** from enforcing or prosecuting matters premised upon 47 U.S.C. § 231 at any time for any conduct.

This is a **FINAL ORDER** and this case is **CONCLUDED.**

/s/ LOWELL A. REED, JR.
LOWELL A. REED, JR., S.J.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1324

AMERICAN CIVIL LIBERTIES UNION; ANDROGYNY BOOKS, INC. D/B/A A DIFFERENT LIGHT BOOKSTORES; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ARTNET WORLDWIDE CORPORATION; BLACKSTRIPE; ADDAZI INC. D/B/A CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; INTERNET CONTENT COALITION; OBGYN.NET; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORE; RIOTGRRL; SALON INTERNET, INC.; WEST STOCK, INC.; PLANETOUT CORPORATION

v.

JOHN ASHCROFT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE UNITED STATES,
APPELLANT

Filed: Mar. 6, 2003

Before: NYGAARD and MCKEE, Circuit Judges, and GARTH, Senior Circuit Judge.

OPINION OF THE COURT

GARTH, Circuit Judge.

This case comes before us on vacatur and remand from the Supreme Court's decision in *Ashcroft v. ACLU*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002), in which the Court held that our decision affirming the District Court's grant of a preliminary injunction against the enforcement of the Child Online Protection Act ("COPA") [1] could not be sustained because "COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Id.* at 1713 (emphasis in original). Pursuant to the Supreme Court's instructions in *Ashcroft*, we have revisited the question of COPA's constitutionality in light of the concerns expressed by the Supreme Court.

Our present review of the District Court's decision and the analysis on which that decision was based does not change the result that we originally had reached, albeit on a ground neither decided nor discussed by the District Court. *See ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000) (*"Reno III"*), *vacated and remanded*, 535 U.S. 564, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002). We had affirmed the District Court's judgment granting the plaintiffs a preliminary injunction against the enforcement of COPA because we had determined that COPA's reliance on "community standards" to identify material "harmful to minors" could not meet the exacting standards of the First Amendment. On remand from the Supreme Court, with that Court's instruction to consider

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[1] We attach the text of COPA as Appendix A.

the other aspects of the District Court's analysis, we once again will affirm.

I.

COPA, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231), is Congress's second attempt to regulate pornography on the Internet. The Supreme Court struck down Congress's first endeavor, the Communications Decency Act, ("CDA"), on First Amendment grounds. *See Reno v. ACLU*, 521 U.S. 844, 117 S.Ct. 2329, 138 L. Ed. 2d 874 (1997) ("*Reno I*"). To place our COPA discussion in context, it is helpful to understand its predecessor, the CDA, and the opinion of the Supreme Court which held it to be unconstitutional.

A.

In *Reno I*, the Supreme Court analyzed the CDA, which prohibited *any* person from posting material on the *Internet* that would be considered either *indecent* or obscene. *See Reno I*, 521 U.S. at 859, 117 S. Ct. 2329. Like COPA, the CDA provided two affirmative defenses to prosecution: (1) the use of a credit card or other age verification system, and (2) any good faith effort to restrict access by minors. *See id.* at 860, 117 S.Ct. 2329.

The Court, in a 7-2 decision, and speaking through Justice Stevens, held that the CDA violated many different facets of the First Amendment. The Court held that the use of the term "indecent," without definition, to describe prohibited content was too vague to withstand constitutional scrutiny.[2] Justice Stevens further deter-

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[2] In particular, the Court cited to discussions of society's concerns regarding prison rape and homosexuality—matters that would have redeeming value, but were nonetheless prohibited by the statute. *See*

mined that "[u]nlike the regulations upheld in *Ginsberg* and *Pacifica*, the scope of the CDA is not limited to commercial speech or commercial entities. . . . [Rather, i]ts open- ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers." *Id.* at 877, 117 S. Ct. 2329.[3]

In holding that "the breadth of the CDA's coverage is wholly unprecedented," the Court continued by noting that "the 'community standards' criterion as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message." *Id.* at 877-78, 117 S. Ct. 2329.

The Court also discussed the constitutional propriety of the credit card/age verification defenses authorized by the CDA. Utilizing the District Court's findings, the Court held that such defenses would not be feasible for most noncommercial Web publishers, and that even with respect to commercial publishers, the technology had yet to be proven effective in shielding minors from harmful material. *See id.* at 881, 117 S. Ct. 2329. As a

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id. at 871, 117 S. Ct. 2329; *see also id.* at 877, 117 S.Ct. 2329 ("The general, undefined terms . . . cover large amounts of non-pornographic material with serious educational or other value.").

[3] Justice Stevens was referring to the Supreme Court's decisions in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), which upheld against a First Amendment challenge a statute prohibiting the sale to minors of materials deemed harmful to them (in that case, "girlie" magazines), *id.* at 634, 88 S. Ct. 1274; and *FCC v. Pacifica Foundation*, 438 U.S. 726, 98 S. Ct. 3026, 57 L. Ed. 2d 1073 (1978), which upheld under the First Amendment the FCC's authority to regulate certain broadcasts it deemed indecent.

result, the Court determined that the CDA was not narrowly tailored to the Government's purported interest, and "lacks the precision that the First Amendment requires when a statute regulates the content of speech." *Id.* at 874, 117 S. Ct. 2329.

B.

COPA, by contrast, represents an attempt by Congress, having been informed by the concerns expressed by the Supreme Court in *Reno I*, to cure the problems identified by the Court when it had invalidated the CDA. Thus, COPA is somewhat narrower in scope than the CDA. COPA provides for civil and criminal penalties for an individual who, or entity that,

> knowingly and with *knowledge* of the character of the material, in interstate or foreign commerce by means of the *World Wide Web*, makes any communication *for commercial purposes* that is available to any minor and that includes any *material that is harmful to minors*.

47 U.S.C. § 231(a)(1) (emphasis added).

Unfortunately, the recited standard for liability in COPA still contains a number of provisions that are constitutionally infirm. True, COPA, in an effort to circumvent the fate of the CDA, expressly defines most of these key terms. For instance, the phrase "by means of the World Wide Web" is defined as the "placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol." *Id.*

§ 231(e)(1).[4] As a result, and as is detailed below, COPA does not target *all* of the other methods of online communication, such as e-mail, newsgroups, etc. that make up what is colloquially known as the "Internet." *See ACLU v. Reno,* 31 F. Supp. 2d 473, 482-83 (Finding of Fact ¶ 7) (E.D. Pa. 1999) (*"Reno II"*).

1.

Further, only "commercial" publishers of content on the World Wide Web can be found liable under COPA. The statute defines "commercial purposes" as those individuals or entities that are "engaged in the business of making such communications." 47 U.S.C. § 231(e)(2)(A). In turn, a person is "engaged in the business" under COPA if that person

> who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the *objective* of earning a profit as a result of such activities (although it is not necessary that the person *make* a profit or that the making or offering to make such communications be the person's sole or principal business or source of income).

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[4] HTTP, or HyperText Transfer Protocol, has been described as follows: "Invisible to the user, HTTP is the actual protocol used by the Web Server and the Client Browser to communicate over the 'wire.' In short, [it is] the protocol used for moving documents around the Internet." NEWTON'S TELECOM DICTIONARY 335 (17th ed.2001).

Essential concepts that are part of HTTP include (as its name implies) the idea that files can contain references to other files whose selection will elicit additional transfer requests.

Id. § 231(e)(2)(B) (emphasis added). Individuals or entities therefore can be found liable under COPA if they seek to make a profit from publishing material on the World Wide Web—thus, individuals who place such material on the World Wide Web *solely* as a hobby, or for fun, or for other than commercial profiteering are not in danger of either criminal or civil liability.

2.

Furthermore, and of greater importance, is the manner in which the statute defines the content of prohibited material; that is, what type of material is considered "harmful to minors." The House Committee Report that accompanied COPA explains that the statute's definition of the "harmful to minors" test constitutes an attempt to fuse the standards upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968), and *Miller v. California*, 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973).[5] *See* H.R. Rep. No. 105-775, at 12-13 (1998).

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[5] As stated earlier, *see* note 3, *supra*, *Ginsberg* upheld a New York statute prohibiting the sale to persons under seventeen years of age of material deemed to be obscene to minors, noting that "the concept of obscenity . . . may vary according to the group to whom the questionable material is directed." *Ginsberg*, 390 U.S. at 636, 88 S. Ct. 1274 (quoting *Bookcase, Inc. v. Broderick*, 18 N.Y. 2d 71, 271 N.Y.S.2d 947, 218 N.E.2d 668, 671 (1966)). Five years later, the Supreme Court announced its decision in *Miller*, which advanced the familiar three-part test for determining obscenity:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller, 413 U.S. at 24, 93 S. Ct. 2607 (internal citations and quotation omitted).

In particular, whether material published on the World Wide Web is "harmful to minors" is governed by a three-part test, *each* prong of which must be satisfied before one can be found liable under COPA:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6).[6]

This definition follows a formulation similar to that which the Supreme Court articulated in *Miller*. Importantly, however, whereas *Miller* applied such standards as related to the average adult, the "harmful to minors" test applies them with respect to minors.[7]

COPA, as earlier noted, also provides a putative defendant with affirmative defenses. If an individual or entity "has restricted access by minors to material that is harmful to minors" through the use of a "credit card, debit account, adult access code, or adult personal iden-

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[6] The statute also provides that material is "harmful to minors" if it is "obscene." 47 U.S.C. § 231(e)(6). That part of the definition of material harmful to minors is not at issue here.

[7] Under COPA, a minor is defined as one under age seventeen. *See* 47 U.S.C. § 231(e)(7).

tification number . . . a digital certificate that verifies age . . . or by any other reasonable measures that are feasible under available technology," the individual will not be liable if a minor should access this restricted material. *Id.* § 231(c)(1). The defense also applies if an individual or entity attempts "in good faith to implement a defense" listed above. *Id.* § 231(c)(2).

C.

On October 22, 1998, the day after President Clinton signed COPA into law, the American Civil Liberties Union, as well as a number of individuals and entities that publish information on the World Wide Web (collectively, the "plaintiffs" or "ACLU"), brought an action in the United States District Court for the Eastern District of Pennsylvania, challenging the constitutionality of the Act. After five days of testimony, the District Court rendered sixty-eight separate findings of fact concerning the Internet and COPA's impact on speech activity. *See Reno II*, 31 F. Supp. 2d at 481-92 (Findings of Fact ¶¶ 0-67). These findings were detailed in our original opinion. *See Reno III*, 217 F.3d at 168-69. We recite only those relevant findings in this opinion when we discuss and analyze the constitutionality of COPA. These findings bind us in this appeal unless found to be clearly erroneous. *See Lackawanna County Dist. Attorney v. Coss*, 532 U.S. 394, 406, 121 S. Ct. 1567, 149 L. Ed. 2d 608 (2001). None of the parties dispute the accuracy of the findings, and as we recited in *Reno III*, 217 F.3d at 170, "none of the parties dispute the District Court's findings (including those describing the Internet and Web), nor are any challenged as clearly erroneous."

The District Court granted the plaintiffs' motion for a preliminary injunction against the enforcement of COPA on the grounds that COPA is likely to be found

unconstitutional on its face for violating the First Amendment rights of adults. *Reno II*, 31 F. Supp. 2d at 495.[8] In so doing, the District Court applied the familiar four-part test in connection with the issuance of a preliminary injunction. *See Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999) (explaining that a preliminary injunction is appropriate where the movant can show (1) a likelihood of success on the merits; (2) irreparable harm without the injunction; (3) a balance of harms in the movant's favor; and (4) the injunction is in the public interest).

In evaluating the likelihood of the plaintiffs' success, the District Court first determined that COPA, as a content-based restriction on protected speech (in this case, nonobscene sexual expression), violated the strict scrutiny test. More specifically, it found that although COPA addressed a compelling governmental interest in protecting minors from harmful material online, it was not narrowly tailored to serve that interest, nor did it provide the least restrictive means of advancing that interest. *See Reno II*, 31 F. Supp. 2d at 493 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989)).

The District Court then addressed the remaining prongs of the preliminary injunction standard, concluding that a failure to enjoin enforcement of COPA would result in irreparable harm, that the balance of harms favored the plaintiffs because the Government does not have "an interest in the enforcement of an unconstitu-

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[8] The plaintiffs, however, did not limit their argument before the District Court to the facial invalidity of COPA with regard to adults. They also argued that COPA was facially invalid for violating the First Amendment rights of minors, and that COPA was unconstitutionally vague in violation of the First and Fifth Amendments. *See Reno II*, 31 F. Supp. 2d at 478-79.

tional law," and that the public interest was "not served by the enforcement of an unconstitutional law. Indeed, [held the District Court,] . . . the interest of the public is served by preservation of the status quo until such time that this Court may ultimately rule on the merits of plaintiffs' claims at trial." *Reno II*, 31 F. Supp. 2d at 498.

As a result, the District Court held that the plaintiffs had satisfied the requirements for a preliminary injunction which enjoined the enforcement of COPA.

D.

We affirmed the District Court's holding, but on different grounds.[9] *See Reno III*. We held that the reference to "community standards" in the definition of "material that is harmful to minors" resulted in an overbroad statute. Because the Internet cannot, through modern technology, be restricted geographically, we held that the "community standards" language subjected Internet providers in even the most tolerant communities to the decency standards of the most puritanical.

As a result, we held that even if we were to assign a narrow meaning to the language of the statute or even if we would sever or delete a portion of the statute that is unconstitutional, we could not remedy the overbreadth problems created by the community standards language. Hence, we affirmed the District Court's preliminary injunction. *See id.* at 179-81.

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[9] In so doing, however, we also addressed the four preliminary injunction factors and held that the plaintiffs had met their burden as to each of the four factors. *See Reno III*, 217 F.3d at 180-81.

E.

The Supreme Court vacated our judgment and remanded the case for further proceedings. The majority opinion, consisting of Parts I, II, and IV of the principal opinion authored by Justice Thomas, was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, and Breyer. It addressed the "narrow question whether the Child Online Protection Act's . . . use of 'community standards' to identify 'material that is harmful to minors' violates the First Amendment." *Ashcroft*, 122 S. Ct. at 1703.

After reviewing its decision in *Reno I* and the two prior decisions in this case, the Supreme Court referred to the "contemporary community standards" language from *Miller*, as representative of the primary concern in evaluating restrictions on speech: "to be certain that . . . [material] will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person-or indeed a totally insensitive one." *Miller*, 413 U.S. at 33, 93 S. Ct. 2607.

As a result, the Court merely held "that COPA's reliance on community standards to identify 'material that is harmful to minors' does not *by itself* render the statute substantially overbroad for purposes of the First Amendment." *Ashcroft*, 122 S. Ct. at 1713 (emphasis in original). The Court was careful, however, not to "express any view as to whether . . . the statute is unconstitutionally vague, or whether the District Court correctly concluded that the statute likely will not survive strict scrutiny analysis once adjudication of the case is completed below." *Id.* The Court did not vacate the District Court's preliminary injunction. *Id.* at 1713-14.

In addition to the limited Opinion of the Court, the *Ashcroft* Court issued a number of other opinions auth-

ored and joined by other Justices, each of which is instructive to us on remand.

For example, Part III-B of Justice Thomas' opinion was joined only by Chief Justice Rehnquist and Justices O'Connor and Scalia. That portion of Justice Thomas' opinion explained that we relied too heavily on the *Reno I* Court's criticism that "the 'community standards' criterion [in the CDA] as applied to the Internet means that any communication available to a nationwide audience will be judged by the standards of the community most likely to be offended by the message," *Ashcroft*, 122 S. Ct. at 1709 (opinion of Thomas, J.) (quoting *Reno I*, 521 U.S. at 877-78, 117 S. Ct. 2329), particularly in light of the fact that COPA was drafted to cover a smaller category of communication than the CDA—namely, communication that appeals to the prurient interest and lacks "serious literary, artistic, political or scientific value to minors." 47 U.S.C. § 231(e)(6)(C).

Moreover, Parts III-A, III-C, and III-D of Justice Thomas' opinion were joined only by Chief Justice Rehnquist and Justice Scalia. Those Parts explained that the consideration of community standards was not invalid simply because providers of material on the Internet are unable to limit the availability of their speech on a geographic basis. He instead pointed out that jurors in different communities are likely to apply their own sensibilities to any consideration of community standards, even national ones. Justice Thomas then concluded that no meaningful distinction existed between the instant case and prior Supreme Court decisions upholding the use of a community standards test with respect to speech transmitted by phone or mail, *see Sable* (phone); *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) (mail), stating that speakers bear the burden of determining their audience,

and that those who find themselves disadvantaged by the fact that Internet communications cannot be limited geographically can simply choose a different, more controllable, medium for their communication. *See Ashcroft*, 122 S. Ct. at 1711-12 (opinion of Thomas, J.).

Justice O'Connor filed an opinion concurring in part and in the judgment. Although she agreed that COPA is not overbroad solely because of its reliance on community standards, she acknowledged the possibility that "the use of local community standards will cause problems for regulation of obscenity on the Internet . . . in future cases." *Id.* at 1714 (O'Connor, J., concurring). She also disagreed with Justice Thomas' argument in Parts III-C and III-D that the Internet may be treated the same as telephone or mail communications: "[G]iven Internet speakers' inability to control the geographic location of their audience, expecting them to bear the burden of controlling the recipients of their speech . . . may be entirely too much to ask." *Id.* As a result, Justice O'Connor advocated the adoption of a national standard for regulating Internet obscenity. She noted that Supreme Court precedents do not forbid such a result, and argued that such a standard would be no more difficult or unrealistic to implement than the standard created for the entire state of California in *Miller*. *Id.* at 1715.

Justice Breyer filed an opinion concurring in part and in the judgment in which he argued that "Congress intended the statutory word 'community' to refer to the Nation's adult community taken as a whole." *Id.* (Breyer, J., concurring). This standard would serve the purpose, argued Justice Breyer, of avoiding the difficult question of constitutionality under the First Amendment while experiencing no more "regional variation" than is

"inherent in a system that draws jurors from a local geographic area." *Id.* at 1716.

Justice Kennedy filed an opinion concurring in the judgment, in which he was joined by Justices Souter and Ginsburg. Although Justice Kennedy agreed with us that a community standards factor when applied to the Internet is a greater burden on speech than when applied to the mails or to telephones, he did not agree that the extent of that burden could be ascertained without analyzing the scope of COPA's other provisions. *See id* at 1719-20 (Kennedy, J., concurring). More specifically, Justice Kennedy felt that we should consider the effect of the provisions limiting COPA's scope to speech used for commercial purposes and to speech that is harmful to minors when taken "as a whole." *See id.* at 1720-21. Only after these provisions are analyzed, argued Justice Kennedy, can the true effect of varying community standards be evaluated, and the question of overbreadth be properly addressed.

Finally, Justice Stevens authored a dissenting opinion, in which he reiterated our concerns expressed in *Reno III* that COPA's community standards factor was itself sufficient to render the statute constitutionally overbroad because communication on the Internet (unlike that through the mails or telephones) may not be restricted geographically. This fact, Justice Stevens claimed, was sufficient to invalidate COPA, particularly in light of the fact that many of the "limiting provisions" (i.e., the prurient interest, the patently offensive and the serious value prongs of the statute) mentioned by Justices Thomas and Kennedy apply only to minors, thereby burdening protected material which should be available to adults. *See id.* at 1726-27 (Stevens, J., dissenting).

Accordingly, on remand, we must again review the District Court's grant of a preliminary injunction in favor of the plaintiffs. This time, however, we must do so in light of the Supreme Court's mandate that the community standards language is not *by itself* a sufficient ground for holding COPA constitutionally overbroad. This direction requires an independent analysis of the issues addressed by the District Court in its original opinion. To assist us in this task, we asked the parties for additional submissions addressed to the opinion of the Supreme Court and to authorities filed subsequent to that opinion and since we last addressed COPA in *Reno III*.

II.

As mentioned above, in order to grant a motion for a preliminary injunction, a district court must address the following four factors:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, 171 F.3d at 158 (citing *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1477 n.2 (3d Cir. 1996) (en banc)). We review the District Court's grant of a preliminary injunction in favor of the ACLU to determine "whether the court abused its discretion, committed an obvious error in applying the law, or made a clear mistake in considering the proof." *In re Assets of Martin*, 1 F.3d 1351, 1357 (3d Cir. 1993) (citing *Philadelphia Marine Trade Ass'n v. Local 1291*, 909

F.2d 754, 756 (3d Cir. 1990), *cert. denied*, 498 U.S. 1083, 111 S. Ct. 953, 112 L. Ed. 2d 1041 (1991)).[10]

The most significant and, indeed, the dispositive prong of the preliminary injunction analysis in the instant appeal is whether the plaintiffs bore their burden of establishing that they had a reasonable probability of succeeding on the merits—that is, whether COPA runs afoul of the First Amendment to the United States Constitution.[11]

We hold that the District Court did not abuse its discretion in granting the preliminary injunction, nor did it err in ruling that the plaintiffs had a probability of prevailing on the merits of their claim inasmuch as COPA cannot survive strict scrutiny. By sustaining that holding, as we do, we would not then be obliged to answer the question of whether COPA is overly broad or vague.

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[10] We have jurisdiction pursuant to the Supreme Court's order remanding the case to us for further proceedings. *See Ashcroft*, 122 S. Ct. at 1714. The plaintiffs have standing to sue because they could all reasonably fear prosecution under COPA, as their Web sites contained material that could be considered harmful to minors under the statute. *Reno III*, 217 F.3d at 171 (citing *Reno II*, 31 F. Supp. 2d at 479).

[11] In addition to being the only portion of the preliminary injunction standard addressed by the Supreme Court in its majority opinion or by the parties in their briefs before this Court, the probability of success prong is the only one about which any real debate exists.

In our earlier opinion in this case, we made clear that "Web publishers would most assuredly suffer irreparable harm" under COPA, that preliminary injunctive relief will not result in greater harm to the Government, as "COPA's threatened constraint on constitutionally protected free speech far outweighs the damage that would be imposed by our failure to affirm this preliminary injunction," and that preliminary injunctive relief is in the public interest because "'neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law.'" *Reno III*, 217 F.3d at 180-81 (citation omitted).

However, in order to "touch all bases" on this remand, we will nevertheless address the overbreadth doctrine with respect to COPA and the related doctrine of vagueness. *See infra* Part II.B.[12] In doing so, we hold that COPA is similarly deficient in that aspect as well.

A. Strict Scrutiny

We turn first, however, to the question of whether COPA may withstand strict scrutiny. Strict scrutiny requires that a statute (1) serve a compelling governmental interest; (2) be narrowly tailored to achieve that interest; and (3) be the least restrictive means of advancing that interest. *Sable*, 492 U.S. at 126, 109 S. Ct. 2829.

1. Compelling Interest

The Supreme Court has held that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Id.* (citing *Ginsberg*, 390 U.S. at 639-40, 88 S.Ct. 1274). The parties agree that the Government's stated interest in protecting minors from harmful material online is compelling. This being so, we proceed to the next question of whether COPA is narrowly tailored to meet that interest.

2. Narrowly Tailored

We hold that the following provisions of COPA are not narrowly tailored to achieve the Government's compelling interest in protecting minors from harmful material and therefore fail the strict scrutiny test: (a) the definition of "material that is harmful to minors," which includes the concept of taking *"as a whole"* material designed to appeal to the "prurient interest" of minors;

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[12] We note that much of our overbreadth analysis overlaps with much of the strict scrutiny analysis we discuss below.

and material which (when judged as a whole) lacks "serious literary" or other "value" *for minors;* (b) the definition of "commercial purposes," which limits the reach of the statute to persons *"engaged in the business"* (broadly defined) of making communications of material that is harmful to minors; and (c) the *"affirmative defenses"* available to publishers, which require the technological screening of users for the purpose of age verification.

(a) "Material Harmful to Minors"

We address first the provision defining "material harmful to minors."[13] Because COPA's definition of harmful material is explicitly focused on minors, it automatically impacts non-obscene, sexually suggestive speech that is otherwise protected for adults.[14] The remaining constitutional question, then, is whether the definition's subsets of "prurient interest" and lacking "serious . . . value for minors" are sufficiently narrowly tailored to satisfy strict scrutiny in light of the statute's stated purpose. We address each of these subsets.

COPA limits its targeted material to that which is designed to appeal to the "prurient interest" of minors. It leaves that judgment, however, to "the average person, applying contemporary community standards" and "taking the material as a whole."

As discussed in our initial opinion on the matter, when contemporary community standards are applied to the Internet, which does not permit speakers or exhibi-

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[13] We note that the text of the statute reads "material *that is* harmful to minors." 47 U.S.C. § 231(e)(6) (emphasis added). For purposes of brevity, we often refer to this phrase as "material harmful to minors."

[14] Obscene materials are not protected under the First Amendment. *See, e.g., Ashcroft*, 122 S. Ct. at 1704 ("[O]bscene speech enjoys no First Amendment protection.").

tors to limit their speech or exhibits geographically, the statute effectively limits the range of permissible material under the statute to that which is deemed acceptable only by the most puritanical communities. This limitation by definition burdens speech otherwise protected under the First Amendment for adults as well as for minors living in more tolerant settings. *See Reno III*, 217 F.3d at 173-80.

This burden becomes even more troublesome when those evaluating questionable material consider it "as a whole" in judging its appeal to minors' prurient interests. As Justice Kennedy suggested in his concurring opinion, it is "essential to answer the vexing question of what it means to evaluate Internet material 'as a whole,' when everything on the Web is connected to everything else." *Ashcroft*, 122 S. Ct. at 1721 (internal citation omitted). We agree with Justice Kennedy's suggestion, and consider this issue here.

While COPA does not define what is intended to be judge "as a whole," the plain language of COPA's "harmful material" definition describes such material as "*any* communication, picture, image file, article, recording, writing, or other matter of any kind" that satisfies the three prongs of the "material harmful to minors" test: prurient interest, patently offensive, and serious value. 47 U.S.C. § 231(e)(6) (emphasis added). In light of the particularity and specificity of Congress's language, Congress had to mean that each individual communication, picture, image, exhibit, etc. be deemed "a whole" by itself in determining whether it appeals to the prurient interests of minors, because that is the unmistakable manner in which the statute is drawn.

The taken "as a whole" language is crucial because the First Amendment requires the consideration of con-

text. As Justice Kennedy observed in his concurring opinion in *Ashcroft*, the application of the constitutional taken "as a whole" requirement is complicated in the Internet context: "It is unclear whether what is to be judged as a whole is a single image on a Web page, a whole Web page, an entire multipage Web site, or an interlocking set of Web sites." *Ashcroft*, 122 S. Ct. at 1717. As the Supreme Court has recently noted:

> [It is] an essential First Amendment rule [that t]he artistic merit of a work does not depend on the presence of a single explicit scene. . . . Under *Miller*, the First Amendment requires that redeeming value be judged by considering the work as a whole. Where the scene is part of the narrative, the work itself does not for this reason become obscene, even though the scene in isolation might be offensive.

Ashcroft v. Free Speech Coalition, 535 U.S. 234, 122 S. Ct. 1389, 1401, 152 L. Ed. 2d 403 (2002) (citation omitted).

Yet, here the plain meaning of COPA's text mandates evaluation of an exhibit on the Internet in isolation, rather than in context. As such, COPA's taken "as a whole" definition surely fails to meet the strictures of the First Amendment.

By limiting the material to individual expressions, rather than to an expanded context, we would be hard-pressed to hold that COPA was narrowly tailored to achieve its designed purpose. For example, one sexual image, which COPA may proscribe as harmful material, might not be deemed to appeal to the prurient interest of minors if it were to be viewed in the context of an entire collection of Renaissance artwork. However, evaluating just that one image or picture or writing by itself rules out a context which may have alleviated its pruri-

ent appeal. As a result, individual communications that may be a integral part of an entirely non-prurient presentation may be held to violate COPA, despite the fact that a completely different result would obtain if the entire context in which the picture or communication was evaluated "as a whole."

Because we view such a statute, construed as its own text unquestionably requires, as pertaining only to single individual exhibits, COPA endangers a wide range of communications, exhibits, and speakers whose messages do not comport with the type of harmful materials legitimately targeted under COPA, i.e., material that is obscene as to minors. *See Ginsberg,* 390 U.S. at 639-43, 88 S. Ct. 1274. Accordingly, while COPA penalizes publishers for making available improper material for minors, at the same time it impermissibly burdens a wide range of speech and exhibits otherwise protected for adults. Thus, in our opinion, the Act, which proscribes publication of material harmful to minors, is not narrowly tailored to serve the Government's stated purpose in protecting minors from such material.

Lastly, COPA's definition of "material that is harmful to minors" only permits regulation of speech that when "taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors.*" 47 U.S.C. § 231(e)(6)(C) (emphasis added). COPA defines the term minor as "any person under 17 [seventeen] years of age." *Id.* § 231(e)(7).[15] The statute does not limit the term minor in any way, and indeed, in its briefing, the

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[15] The term "minor" appears in both the "prurient interest" and "patently offensive" prongs of COPA's "material that is harmful to minors" definition. *See* statutory text *supra* Part I.B.2. The problems with the definition of minor which we identify in this section are applicable to both these two prongs. As such, these prongs are also constitutionally infirm on that ground.

Government, in complete disregard of the text, contends that minor means a "normal, older adolescent." Orig. Gov't Br. at 32; Gov't Br. on Remand at 27-28; Gov't Reply Br. on Remand at 4-5.

We need not suggest how the statute's targeted population could be more narrowly defined, because even the Government does not argue, as it could not, that materials that have "serious literary, artistic, political or scientific value" for a sixteen-year-old would have the same value for a minor who is three years old. Nor does any party argue, despite Congress's having targeted and included *all* minors seventeen or under, that *pre-adolescent minors* (i.e., ages two, three, four, etc.) could be patently offended by a "normal or perverted sexual act" or have their "prurient interest" aroused by a "post-pubescent female breast," or by being exposed to whatever other material may be designed to appeal to prurient interests.

The term "minor," as Congress has drafted it, thus applies in a literal sense to an infant, a five- year old, or a person just shy of age seventeen. In abiding by this definition, Web publishers who seek to determine whether their Web sites will run afoul of COPA cannot tell which of these "minors" should be considered in deciding the particular content of their Internet postings. Instead, they must guess at which minor should be considered in determining whether the content of their Web site has "serious . . . value for [those] minors." 47 U.S.C. § 231(e)(6)(C). Likewise, if they try to comply with COPA's "harmful to minors" definition, they must guess at the potential audience of minors and their ages so that the publishers can refrain from posting material that will trigger the prurient interest, or be patently offensive with respect to those minors who may be deemed to have such interests.

The Government has argued that "minors" should be read to apply only to normal, older adolescents. We realize as a pragmatic matter that some *pre-* adolescent minors may, by definition, be incapable of possessing a prurient interest. It is not clear, however, that the Government's proffered definition meets Congress's intended meaning for the term "minor" with respect to the "patently offensive" and "serious value" prongs. Furthermore, Congress has identified as objects of its concern children who cannot be described as "older" adolescents:

> Moreover, because of sophisticated, yet easy to use navigating software, minors who can read and type are capable of conducting Web searches as easily as operating a television remote. While a *four-year old may not be as capable as a thirteen year old,* given the right tools (e.g., a child trackball and browser software) each has the ability to 'surf' the Net and will likely be exposed to harmful material.

H.R. Rep. No. 105-775, at 9-10 (emphasis added). Moreover, the statute, if meant to pertain only to normal, older adolescents (as the Government claims it does), does not by its own definition restrict its application to older adolescents, although we assume that Congress could have defined that universe in that manner.

Because the plain meaning of the statute's text is evident, we decline to rewrite Congress's definition of "minor."[16] We would note, however, that even if we

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[16] The Government has cited cases from two other Circuits in support of its proffered narrowing construction of "minor." We do not find these analyses helpful. In *American Booksellers v. Webb*, 919 F.2d 1493 (11th Cir.1990), *cert. denied*, 500 U.S. 942, 111 S. Ct. 2237, 114 L. Ed. 2d 479 (1991), the Eleventh Circuit upheld a Georgia law restricting the display of material "harmful to minors" in light of the fact that the use of blinder racks would satisfy the statute's requirement. *Id.* at 1508-09.

In analyzing the "harmful to minors" test contained in that statute, the Eleventh Circuit interpreted the Supreme Court's opinion in *Pope v. Illinois*, 481 U.S. 497, 107 S. Ct. 1918, 95 L. Ed. 2d 439 (1987), to "teach[] that if any reasonable minor, including a seventeen-year-old, would find serious value, the material is not 'harmful to minors.'" *American Booksellers*, 919 F.2d at 1504-05.

We do not think that *Pope* leads to the conclusions that the Eleventh Circuit drew. In *Pope*, the Court explained that, under the "serious value" prong of the *Miller* test for obscenity, "The proper inquiry is not whether an ordinary member of any given community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a *reasonable person* would find such value in the material, taken as a whole." *Pope*, 481 U.S. at 500-01, 107 S. Ct. 1918 (emphasis added). It does seem logical that if *Pope* requires a reasonable person standard for the "serious value" prong of the *Miller* test, then an analogous "serious value for minors" prong of a "harmful to minors" test would look to the value for a "reasonable minor." It does not follow, however, that the "reasonable minor" must be judged by reference to minors at the upper end of the spectrum of ages encompassed in the term "minor," unless the statute is drawn in that particular manner. We are not persuaded that COPA can be read and enforced that way.

The Fourth Circuit's opinion in *American Booksellers Ass'n v. Virginia*, 882 F.2d 125 (4th Cir.1989), *cert. denied*, 494 U.S. 1056, 110 S. Ct. 1525, 108 L. Ed. 2d 764 (1990), is likewise inapplicable. That case dealt with the interpretation of a Virginia statute prohibiting the display of sexually explicit materials to "juveniles [less than eighteen years of age]." *Id.* at 127 (citing Va. Code § 18.2390(6)(c) (1982 & Supp. 1987)). The Fourth Circuit adopted the Virginia Supreme Court's interpretation of the state statute: "The Virginia Court then concluded that the ["serious value"] standard [of the Virginia statute] should be applied as it affects a 'legitimate minority of normal, older adolescents.'" *Id.* (citing *Commonwealth v. American Booksellers Ass'n*, 236 Va. 168, 372 S.E.2d 618, 624 (1988)). Of course, the Virginia Supreme Court's interpretation of the state statute (a question that had been certified to the Virginia Court by the Supreme Court, *see Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988)), is not binding on our interpretation of COPA. Hence, there is no reason to adopt or be persuaded by the statutory construction of the Virginia Supreme Court in our construction of COPA.

The Fourth Circuit has recently certified to the Virginia Supreme

accepted the Government's argument, the term "minors" would not be tailored narrowly enough to satisfy strict scrutiny.

Regardless of what the lower end of the range of relevant minors is, Web publishers would face great uncertainty in deciding what minor could be exposed to its publication, so that a publisher could predict, and guard against, potential liability. Even if the statutory meaning of "minor" were limited to minors between the ages of thirteen and seventeen, Web publishers would still face too much uncertitude as to the nature of material that COPA proscribes.

We do not suggest how Congress could have tailored its statute—that is not our function. We do no more than conclude that the use of the term "minors" in all three prongs of the statute's definition of "material harmful to minors" is not narrowly drawn to achieve the statute's purpose—it is not defended by the Government in the exact terms of the statute, and does not lend itself to a commonsense meaning when consideration is given to the fact that minors range in age from infants to seventeen years. Therefore, even if we were to accept the narrowing construction that the Government proposes —and we do not—COPA's definition of the term "minor," viewed in conjunction with the "material harmful

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Court two questions relating to the scope of a 1999 amendment to the Virginia statute at issue in *American Booksellers Ass'n v. Virginia. See PSINet, Inc. v. Chapman*, 317 F.3d 413 (4th Cir.2003) (citing Va. Code § 18.2- 391, 1999 Va. Act ch. 936). Subsequent to oral argument, the Government submitted a letter pursuant to Federal Rule of Appellate Procedure 28(j) calling to our attention this order pertaining to the constitutionality of the 1999 amendment, which extends the regulation of sexually explicit material deemed "harmful to juveniles" to the Internet context. For the reasons we have identified, the Fourth Circuit's certification order has no bearing on our interpretation of COPA.

to minors" test, is not tailored narrowly enough to satisfy the First Amendment's requirements.

(b) "Commercial Purposes"

COPA's purported limitation of liability to persons making communications "for commercial purposes" does not narrow the reach of COPA sufficiently. Instead, COPA's definitions subject too wide a range of Web publishers to potential liability. As the District Court observed, "There is nothing in the text of COPA . . . that limits its applicability to so-called commercial pornographers only." *Reno II*, 31 F. Supp. 2d at 480. Indeed, as we read COPA, it extends to any Web publisher who makes any communication "for commercial purposes." 47 U.S.C. § 231(a)(1).

The statute includes within "commercial purposes" any Web publisher who meets COPA's broad definition of being "engaged in the business" of making such communications. *Id.* § 231(e)(2)(A). The definition of "engaged in the business" applies to any person whose communication "includes *any material* that is harmful to minors" and who "devotes time . . . to such activities, as a *regular* course of such person's trade or business, with the objective of earning a profit," if that person "knowingly causes [or solicits] the material that is harmful to minors to be posted on the World Wide Web." *Id* § 231(e)(2)(B) (emphasis added).

Based on this broad definition of "engaged in the business," we read COPA to apply to Web publishers who have posted *any* material that is "harmful to minors" on their Web sites, even if they do not make a profit from such material itself or do not post such material as the principal part of their business. Under the plain language of COPA, a Web publisher will be sub-

jected to liability if even a small part of his or her Web site displays material "harmful to minors."[17]

Moreover, the definition of "commercial purposes" further expands COPA's reach beyond those enterprises that sell services or goods to consumers, including those persons who sell advertising space on their otherwise noncommercial Web sites. *See Reno II*, 31 F. Supp. 2d at 487 (Finding of Fact ¶ 33). Thus, the "engaged in the business" definition would encompass both the commercial pornographer who profits from his or her online traffic, as well as the Web publisher who provides free content on his or her Web site and seeks advertising revenue, perhaps only to defray the cost of maintaining the Web site.[18] *See also Ashcroft*, 122 S. Ct. at 1721 (Kennedy, J., concurring) ("Indeed, the plain text of the Act does not limit its scope to pornography that is offered for sale; it seems to apply even to speech provided

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[17] As we have explained earlier, *see* Part II.A.2(a), *supra*, COPA's definition of material refers to *any single* "communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind." 47 U.S.C. § 231(e)(6).

[18] We do not here confront the question of statutory interpretation whether the term "profit," in the context of COPA's definition of "engaged in the business," includes only those Web publishers seeking to earn economic profits or also includes nonprofit organizations or charities that seek to obtain revenue or contributions—though not economic profits—from their Web sites. As one amicus brief notes, Congress did not exempt non-profit organizations as designated under the Internal Revenue Code. *See* Br. of Amici Curiae American Society of Journalists and Authors et al. at 6-7. If the term "profit," (and therefore the term "engaged in the business") includes Web publishers that are non-profit organizations, the scope of persons covered by COPA would be greatly expanded. Because of the large number of commercial entities that maintain Web sites (as found by the District Court), the scope of COPA, regardless of whether it covers non-profits, is in any event far broader than the core of commercial pornographers and the like that the Government has argued that COPA is intended to target.

for free, so long as the speaker merely hopes to profit as an indirect result."). The latter model is a common phenomenon on the Internet. *See Reno II*, 31 F. Supp. 2d at 484 (Findings of Fact ¶¶ 23, 30). This expansive definition of "engaged in the business" therefore includes a large number of Web publishers. Indeed, the District Court in its findings of fact cited to testimony that approximately one-third of the 3.5 million global Web sites (existing at that time) are "commercial," or "intend[ed] to make a profit." *Id.* at 486 (Finding of Fact ¶ 27).

Contrary to our reading and understanding of COPA, the Government contends that COPA's definition of "engaged in the business" limits liability to those persons who publish material that is harmful to minors "as a regular course of such person's business or trade," 47 U.S.C. § 231(e)(2)(B), claiming that this qualification limits the coverage of COPA. Based on this language, the Government argues that "COPA by its terms covers only those 'harmful to minors' communications that are made by a person as a normal part of his or her for-profit business." Gov't Br. on Remand at 36 (internal quotation marks added). Indeed, the Government contends that COPA "covers only those communications that have a *substantial connection* to the *regular online marketing* of material that is harmful to minors." *Id.* at 36-37 (emphasis added).

We do not find the Government's argument persuasive. COPA's use of the phrase "regular course" does not narrow the scope of speech covered because it does not place any limitations on the amount, or the proportion, of a Web publisher's posted content that constitutes such material. Thus, even if posted material that is harmful to minors constitutes only a very small, or even infinitesimal, part of a publisher's entire Web site, the publisher may still be subject to liability. For exam-

ple, if a Web site whose content deals primarily with medical information, but also "regularly" publishes a biweekly column devoted to sexual matters which could be deemed "harmful to minors," the publisher might well be subject to criminal liability under COPA. Although such a Web site primarily publishes medical information that is not "harmful to minors," the biweekly column, according to the Government's reading of COPA, would be a publication in "regular course."

In sum, while the "commercial purposes" limitation makes the reach of COPA less broad than its predecessor, inasmuch as the Communications Decency Act (CDA) was not limited to commercial entities, *see Reno I*, 521 U.S. at 877, 117 S. Ct. 2329, COPA's definition of "commercial purposes" nevertheless imposes content restrictions on a substantial number of "commercial," non- obscene speakers in violation of the First Amendment. We are satisfied that COPA is not narrowly tailored to proscribe commercial pornographers and their ilk, as the Government contends, but instead prohibits a wide range of protected expression.

(c) Affirmative Defenses

The Government argues that COPA's burdens are limited and reasonable, and points to COPA's affirmative defenses in support of the statute's constitutionality. We examine whether the affirmative defenses in COPA serve to tailor the statute narrowly, as the Government asserts.

COPA's affirmative defenses shield Web publishers from liability under the statute if they, in good faith, restrict access to material deemed harmful to minors. COPA provides as follows:

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

> (A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> (B) by accepting a digital certificate that verifies age; or
>
> (C) by any other reasonable measures that are feasible under available technology.

47 U.S.C. § 231(c)(1).[19]

The District Court held that COPA's affirmative defenses burdened otherwise protected adult speech in a way that prevented the statute from surviving strict scrutiny. In determining that the application of these defenses would unduly burden protected adult speech, the District Court concluded that

> Evidence presented to this Court is likely to establish at trial that the implementation of credit card or adult verification screens in front of material that is harmful to minors may deter users from accessing such materials and that the loss of users of such material may affect the speakers' economic ability to

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[19] The District Court found, and the Government does not argue otherwise, that the "digital certificate" and "other reasonable measures" are not effective or feasible: "The parties' expert witnesses agree that at this time, while it is technologically possible, *there is no certificate authority that will issue a digital certificate that verifies a user's age*. . . . The plaintiffs presented testimony that there are *no other reasonable alternatives that are technologically feasible* at this time to verify age online. . . . The defendant did not present evidence to the contrary." *Reno II*, 31 F. Supp. 2d at 487-88 (Finding of Fact ¶ 37) (emphasis added) (internal citations omitted).

> provide such communications. The plaintiffs are likely to establish at trial that under COPA, Web site operators and content providers may feel an economic disincentive to engage in communications that are or may be considered to be harmful to minors and thus, may self-censor the content of their sites. Further, the uncontroverted evidence showed that there is no way to restrict the access of minors to harmful materials in chat rooms and discussion groups, which the plaintiffs assert draw traffic to their sites, without screening all users before accessing any content, even that which is not harmful to minors, or editing all content before it is posted to exclude material that is harmful to minors. I conclude that based on the evidence presented to date, the plaintiffs have established a substantial likelihood that they will be able to show that COPA imposes a burden on speech that is protected for adults.

Reno II, 31 F. Supp. 2d at 495 (citations omitted).

The Government maintains that the District Court overstated the burdens on protected speech created by utilization of COPA's affirmative defenses. The record and our own limited standard of review, however, belie that claim.

First, the actual effect on users as a result of COPA's affirmative defenses, which the Government minimizes, was determined by the District Court in its factual findings, after hearing testimony from both parties. Both the expert offered by the plaintiffs and one of the experts proffered by the Government testified that users could be deterred from accessing the plaintiffs' Web sites as a result of COPA's affirmative defenses. The plaintiffs' expert went on to testify that "economic harm

. . . would result from loss of traffic." *Id.* at 491 (Finding of Fact ¶ 61).

Although the Government presented its own expert who testified that "COPA would not impose an unreasonable economic burden . . . on the seven Web sites of the plaintiffs," the District Court, in exercising its fact-finding function, determined that "plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens." *Id.* at 492 (Findings of Fact ¶¶ 61-62). We cannot say, nor has the Government claimed, that the District Court's factual determination is clearly erroneous.

COPA's restrictions on speech, as the District Court has found and as we agree, are not, as the Government has argued, analogous to the incidental restrictions caused by slow response times, broken links, or poor site design that "already inhibit a user's . . . experience." Orig. Gov't Br. at 42 (citation omitted); Gov't Br. on Remand at 40-41 (citation omitted). Requiring a user to pay a fee for use of an adult verification service or to enter personal information prior to accessing certain material constitutes a much more severe burden on speech than any technical difficulties, which are often repairable and cause only minor delays.

We agree with the District Court's determination that COPA will likely deter many adults from accessing restricted content, because many Web users are simply unwilling to provide identification information in order to gain access to content, especially where the information they wish to access is sensitive or controversial.[20]

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[20] The Government's argument to the contrary is not persuasive. Its reliance on the success of online publishers such as *The Wall Street*

People may fear to transmit their personal information, and may also fear that their personal, identifying information will be collected and stored in the records of various Web sites or providers of adult identification numbers.[21]

The Supreme Court has disapproved of content-based restrictions that require recipients to identify themselves affirmatively before being granted access to disfavored speech, because such restrictions can have an impermissible chilling effect on those would-be recipients.[22]

Journal, as well as online merchants such as Amazon.com, is misplaced. The Government noted that those publishers' and merchants' Web sites require persons to provide personal information. *See* Gov't Br. on Remand at 11. Such sites, however, are not analogous to Internet sites that provide speech that is protected for adults that might nonetheless be harmful to minors. As the District Court noted in its findings of fact, certain of the plaintiffs testified that their Web sites contain controversial or sensitive information that adult readers would be deterred from obtaining if they were required to register or otherwise identify themselves. *See Reno II*, 31 F. Supp. 2d at 485-86 (Findings of Fact ¶¶ 25-26).

[21] The Government asserts that 47 U.S.C. § 231(d)(1), which limits the disclosure of "any information collected for the purposes of restricting access" to material harmful to minors without prior written consent (subject to exceptions), constitute "substantial privacy protections." Gov't Br. on Remand at 41. But the statute does not appear to impose any penalties on those who fail to comply with the privacy protection in § 231(d)(1). Furthermore, the existence of the statutory privacy protection does not negate the likelihood that adults will be chilled in accessing speech protected for them; adults may reasonably fear that their information will be disclosed, this provision notwithstanding.

[22] See, e.g., *Lamont* v. *Postmaster General*, 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed. 2d 398 (1965) (holding that federal statute requiring Postmaster to halt delivery of communist propaganda unless affirmatively requested by addressee violated First Amendment); *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 732-33, 116 S. Ct. 2374, 135 L. Ed. 2d 888 (1996) (holding unconstitutional a federal law

Second, the affirmative defenses do not provide the Web publishers with assurances of freedom from prosecution. As the Supreme Court noted in *Free Speech Coalition*, "The Government raises serious constitutional difficulties by seeking to impose on the defendant the burden of proving his speech is not unlawful." *Free Speech Coalition*, 122 S. Ct. at 1404. Although the criminal penalties under the federal statute concerning virtual child pornography, at issue in *Free Speech Coalition*, were more severe than the penalties under COPA, the logic is applicable: "An affirmative defense applies only after prosecution has begun, and the speaker must himself prove . . . that his conduct falls within the affirmative defense." *Id.*

Lastly, none of the display-restriction cases relied on by the Government are apposite here, as each involved the use of blinder racks to shield minors from viewing harmful material on display. Orig. Gov't Br. at 43-44; Gov't Br. on Remand at 44-45; Gov't Reply Br. on Remand at 13-14.[23] The use of "blinder racks," or some

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requiring cable operators to allow access to sexually explicit programming only to those subscribers who request access to the programming in advance and in writing). *Cf. American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406 (E.D.Pa.) (three-judge court) (holding as unconstitutional federal statute that conditions receipt of federal funds by public libraries on use of filtering software because, *inter alia*, provision requiring adults to request library to disable filters to access protected speech imposed too great a burden), *prob. juris. noted*, —U.S. —, 123 S. Ct. 551, 154 L. Ed. 2d 424 (2002).

[23] See, e.g., Crawford v. Lungren, 96 F.3d 380 (9th Cir.1996) (upholding statute banning sale of material harmful to minors in unsupervised sidewalk vending machines), *cert. denied*, 520 U.S. 1117, 117 S.Ct. 1249, 137 L. Ed. 2d 330 (1997); *Webb*, 919 F.2d 1493 (11th Cir.1990) (upholding statute making it unlawful to "exhibit, expose, or display in public at newsstands or any other business or commercial establishment or at any other public place frequented by minors" material harmful to them); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780

analogous device, does not create the same deterrent effect on adults as would COPA's credit card or adult verification screens. Blinder racks do not require adults to compromise their anonymity in their viewing of material harmful to minors, nor do they create any financial burden on the user. Moreover, they do not burden the speech contained in the targeted publications any more than is absolutely necessary to shield minors from its content. We cannot say the same with respect to COPA's affirmative defenses.

The effect of the affirmative defenses, as they burden "material harmful to minors" which is constitutionally protected for adults, is to drive this protected speech from the marketplace of ideas on the Internet. This type of regulation is prohibited under the First Amendment. As the Supreme Court has recently said, "[S]peech within the rights of adults to hear may not be silenced completely in an attempt to shield children from it." *Free Speech Coalition*, 122 S. Ct. at 1402 (citation omitted). COPA, though less broad than the CDA, "effectively resembles [a] ban," on adults' access to protected speech; the chilling effect occasioned by the affirmative defenses results in the "unnecessarily broad suppression of speech addressed to adults." *Reno I*, 521 U.S. at 875, 117 S. Ct. 2329.

F.2d 1389 (8th Cir.1985) (upholding an ordinance requiring an opaque cover on and the sealing of any material deemed harmful to minors and displayed for commercial purposes); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir.1983) (upholding a blinder rack ordinance); *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520 (Tenn.1993) (upholding statute restricting the display for sale of material harmful to minors "anywhere minors are lawfully admitted"); *American Booksellers Ass'n v. Rendell*, 332 Pa. Super. 537, 481 A.2d 919 (1984) (upholding statute prohibiting display of sexually explicit materials where minors could see them).

3. Least Restrictive Means

As we have just explained, COPA is not narrowly tailored and as such fails strict scrutiny. We are also satisfied that COPA does not employ the "least restrictive means" to effect the Government's compelling interest in protecting minors.

The Supreme Court has stated that "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *see also Reno I*, 521 U.S. at 874, 117 S. Ct. 2329 ("[The CDA's Internet indecency provisions'] burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *Sable*, 492 U.S. at 126, 109 S. Ct. 2829.

The District Court determined, based on its findings of fact, that COPA would be of limited effectiveness in achieving its aim. *See Reno II*, 31 F. Supp. 2d at 496 (COPA has "problems . . . with efficaciously meeting its goal."). To reach that conclusion, the District Court relied on its findings that (1) under COPA children may still be able to access material deemed harmful to them on "foreign Web sites, non-commercial sites, and . . . via protocols other than http," *id.* at 496; *see also id.* at 482-84, 492 (Findings of Fact ¶¶ 7-8, 19-20, 66); and (2) that children may be able to obtain credit cards—either their parents' or their own—legitimately and so circumvent the screening contemplated by COPA's affirmative defenses. *See id.* at 489 (Finding of Fact ¶ 48).

We first examine the alternative of blocking and filtering technology. The District Court described this technology as follows:

> [B]locking or filtering software may be used to block Web sites and other content on the Internet that is inappropriate for minors. Such technology may be downloaded and installed on a user's home computer at a price of approximately $40.00. Alternatively, it may operate on the user's ISP (Internet Service Provider)]. Blocking technology can be used to block access by minors to whole sites or pages within a site.

Id. at 492 (Finding of Fact ¶ 65).[24] The District Court concluded that blocking and filtering technology, although imperfect, "may be at least as successful as COPA would be in restricting minors' access to harmful

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[24] The Report of the House Committee on Commerce, prepared in support of COPA, provides a more detailed discussion of this technology:

> In general, blocking or filtering software programs work in conjunction with Internet browsers such as Netscape Navigator and Microsoft's Internet Explorer, and are either installed directly onto individual computers or onto a host server used with a network of computers. Blocking or filtering software could also be installed at the site of the Internet access provider. Software to block access to websites has existed for many years. . . .
>
> In order to block Internet sites, a software vendor identifies categories of material to be restricted and then configures the software to block sites containing those categories of speech. Some software blocking vendors employ individuals who browse the Internet for sites to block, while others use automated searching tools to identify which sites to block. New products are constantly being developed, however, that could improve the effectiveness of the blocking software. For example, at least one product has been designed that is capable of analyzing the content being retrieved by the computer. By analyzing the content, rather than a predefined list of sites, the product is capable of screening inappropriate material from chat rooms, e-mail, attached documents, search engines, and web browsers. Such products will help parents and educators reduce a minor's exposure to sexually explicit material.

H.R. Rep. No. 105-775, at 19.

material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users." *Id.* at 497. Indeed, the District Court found that blocking and filtering technology, if installed by parents, would shield minors from harmful Internet communication occurring within a broader range of venues than that covered by COPA: "Blocking and filtering software will block minors from accessing harmful to minors materials posted on foreign Web sites, non-profit Web sites, and newsgroups, chat, and other materials that utilize a protocol other than HTTP." *Id.* at 492 (Finding of Fact ¶ 65).

The Government, however, argues that filtering software is not a viable means of protecting children from harmful material online because it is not nearly as effective as COPA at protecting minors. The Government offers the following three reasons for this conclusion: (1) filtering software is voluntary—it transfers the burden of protecting children from the source of the harmful material, i.e., the Web publishers, to the potential victims and their parents; (2) filtering software is often both over- and underinclusive of targeted material; and (3) it is more effective to screen material "prior to it being sent or posted to minors" on the Internet. *See* Gov't Br. on Remand at 47.[25]

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[25] We see no need for sustained discussion of the Government's third argument. The Government's assertion that it is more effective to screen material before it is posted on the Internet, is no answer at all. First, we cannot say that the blocking and filtering technology is sufficiently less effective than COPA such that the technology could not be considered as an alternative for purposes of the least restrictive means analysis. Second, to the extent that the Government relies on prescreening as the rationale for claiming that COPA is more effective, the argument proves too much. It is of course true that Web publishers' self-censorship will reduce the potential for communication of material

The Government makes much of the notion that the voluntary use of blocking and filtering software places an onus on parents. *Id.* (noting "the concern that the expense of purchasing and updating such software programs might 'discourage adults or schools from using them.'") (quoting H.R. Rep. No. 105-775, at 1920).

But the Supreme Court has effectively answered this contention. The Court stated in *Playboy*, "A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act." *Playboy*, 529 U.S. at 805, 120 S. Ct. 1878. The *Playboy* Court held unconstitutional a federal statutory provision that required cable operators who provide channels primarily dedicated to sexually-oriented programming to scramble or block those channels completely, or to "time channel" their transmission, i.e., limit their availability to hours between 10 p.m. and 6 a.m., when, in Congress's view, children are unlikely to be viewing television. By this provision Congress sought to prevent children's exposure to content contained on such channels as a result of "signal bleed."[26]

The Court determined that this provision constituted a "significant restriction of [protected] communication between speakers and willing adult listeners." *Id.* at 812, 120 S. Ct. 1878. The Court held that this provision failed strict scrutiny because Congress had available to it an effective, less restrictive means of achieving its ends. In particular, Congress had provided for an

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harmful to minors, but the cost results in an intolerable chilling effect. *See* Part II.A.2(c), *supra*.

[26] "Signal bleed" refers to a phenomenon whereby scrambled programming becomes visible or audible from time to time. *Playboy*, 529 U.S. at 807, 120 S. Ct. 1878.

"optout" provision whereby a cable subscriber could request the cable company to scramble fully or block completely the receipt of sexually explicit channels. The Court explained that the voluntary nature of the "opt-out" provision rendered it less restrictive: "It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time." *Id.* at 824, 120 S. Ct. 1878. Instead, the Court explained that reliance upon "informed and empowered parents," *id.* at 825, 120 S. Ct. 1878, was the preferable alternative:

> The regulatory alternative of a publicized ["opt-out" provision], which has . . . the choice of an effective blocking system, would provide parents the information needed to engage in active supervision. The government has not shown that this alternative, a regime of added communication and support, would be insufficient to secure its objective, or that any overriding harm justifies its intervention.

Id. at 825-26, 120 S. Ct. 1878.

In *Fabulous Associates Inc. v. Pennsylvania Public Utility Commission*, 896 F.2d 780 (3d Cir. 1990), we had held unconstitutional a Pennsylvania law that required adults to obtain nine-digit access codes in order to listen to dial-a-porn messages on their telephones. We held that the statute was not the least restrictive means of achieving the state's interest in protecting minors from such messages because it required a loss of anonymity on the part of adults. Although we recognized that preblocking would not protect minors in homes where adult residents had unblocked the lines, we held that the "responsibility for making such choices [between individually accessing such speech and protecting minor dependents from that speech] is where our society has tradi-

tionally placed it—on the shoulders of the parent." *Id.* at 788 (citing *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74, 103 S. Ct. 2875, 77 L. Ed. 2d 469 (1983)).

As with the "opt-out" alternative available in *Playboy,* which would allow parents to block sexually-oriented cable channels effectively, and as with the preblocking alternative described in *Fabulous Associates,* here filtering software is a less restrictive alternative that can allow parents some measure of control over their children's access to speech that parents consider inappropriate.[27]

The Government also argues that the blocking and filtering software is not as effective as COPA in that it is both over- and underinclusive. To be sure, blocking and filtering software may sometimes block too little and sometimes block too much Internet speech. As the District Court found, blocking and filtering technology is not perfect in that "some Web sites that may be deemed inappropriate for minors may not be blocked while some Web sites that are not inappropriate for minors may be blocked." *Reno II,* 31 F. Supp. 2d at 492 (Finding of Fact ¶ 66). The District Court found, however, that no evidence had been presented "as to the percentage of time that blocking and filtering technology is over- or underinclusive." *Id.* Moreover, the District Court, as noted above, determined that blocking and filtering software could be at least as effective as COPA, because COPA does not reach "foreign Web sites, noncommercial sites, and . . . [materials avail-

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[27] We recognize that parents may face financial costs in purchasing such software. *See Reno II,* 31 F. Supp. 2d at 492 (Finding of Fact ¶ 65) ("Such technology may be downloaded and installed on a user's home computer at a price of approximately $40.00.").

able online] via protocols other than http." *Reno II*, 31 F.Supp.2d at 496.[28]

A three-judge court has recently held that a federal law requiring the use of filtering and blocking software on computers at libraries that received federal funding violates the First Amendment. *See American Library Ass'n v. United States*, 201 F. Supp. 2d 401, 406 (E.D. Pa.) (three-judge court), *prob. juris. noted*, ___ U.S. ___, 123 S. Ct. 551, 154 L. Ed. 2d 424 (2002). This decision does not compel a different result here. In that case, the *American Library* court noted that blocking and filtering technology overblocks and underblocks Internet content.[29] That decision, however, is distinguishable

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[28] The District Court's findings of fact on which the above conclusions are based are not clearly erroneous. As we recited earlier, the Government did not, and does not, contend that the findings are clearly erroneous. *See Reno III*, 217 F.3d at 170. It follows that both COPA and blocking and filtering technology are over-and underinclusive in differing ways, and we agree with the District Court's conclusion that as a result, such technology may be at least as effective as COPA.

For further discussion of COPA's overinclusiveness, see our discussion of overbreadth, *infra*.

[29] As the *American Library* court explained:

> Although [blocking and filtering software] programs are somewhat effective in blocking large quantities of pornography, they are blunt instruments that not only "underblock," i.e., fail to block access to substantial amounts of content that the library boards wish to exclude, but also, central to this litigation, "overblock," i.e., block access to large quantities of material that library boards do not wish to exclude and that is constitutionally protected.

American Library, 201 F. Supp. 2d at 406.

In addition, we recognize that a report approved by the governing board of the National Research Council, by a committee chaired by the Honorable Dick Thornburgh, four years after COPA was enacted (2002), similarly concluded that:

> Filters are capable of blocking inappropriate sexually explicit material at a high level of effectiveness—if a high rate of over-blocking

because, whereas the Act at issue in *American Library* involved Government-mandated use of blocking and filtering software, here we only consider the *voluntary* use of such software by parents who have chosen to use this means to protect their children. We also note that, in *American Library,* the Government sought to defend the legislation at issue by reference to the statute's "disabling provision," which *required* adults to identify themselves to librarians in order to disable the filtering software on library computers, and thus gain unfettered access to the wide range of speech on the Internet. The court held that this "disabling provision" created a chilling effect on adult library patrons' access to protected speech, [30] just as we have determined that COPA's affirmative defenses, by requiring the use of a credit card or adult identification number, similarly place an impermissible burden on adult users.

We agree with the District Court that the various blocking and filtering techniques which that Court discussed may be substantially less restrictive than COPA in achieving COPA's objective of preventing a minor's

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is also acceptable. Thus, filters are a reasonable choice for risk-averse parents or custodians (e.g., teachers) who place a very high priority on preventing exposure to such material and who are willing to accept the consequences of such overblocking.

COMMITTEE TO STUDY TOOLS AND STRATEGIES FOR PROTECTING KIDS FROM PORNOGRAPHY, NATIONAL RESEARCH COUNCIL, YOUTH, PORNOGRAPHY AND THE INTERNET § 12.1.8 (Dick Thornburgh & Herbert S. Lin eds., 2002), *available at http://www.nap.edu/html/youth_internet/* (last visited Feb. 6, 2003).

[30] *See American Library,* 201 F. Supp. 2d at 486 ("By requiring library patrons affirmatively to request permission to access certain speech singled out on the basis of its content, [the federal law at issue] will deter patrons from requesting that a library disable filters to allow the patron to access speech that is constitutionally protected, yet sensitive in nature.").

access to harmful material. We are influenced further in this conclusion by our reading of the Report of the House Committee on Commerce, which had advocated the enactment of COPA. *See* H.R. REP. NO. 105-775 (1998). That Report described a number of techniques and/or alternatives to be used in conjunction with blocking and filtering software, although the techniques were not adopted at that time. In each instance, these techniques would appear to constitute a less restrictive alternative than COPA's prescriptions. Moreover, we are at least four years beyond the technology then considered by the Committee, and as we had initially observed, "in light of rapidly developing technological advances, what may now be impossible to regulate constitutionally may, in the not-too-distant future, become feasible." *Reno III*, 217 F.3d at 166.

Because the techniques and/or alternatives considered by the Committee (i.e., "tagging," "domain name zoning," etc.), *see* H.R. REP. NO. 105-775, at 16-20, were not addressed either by the parties or the District Court, we do not rely upon them here. We do no more than draw attention to the fact that other possibly less restrictive alternatives existed when COPA was enacted and more undoubtedly will be available in the future—many of which might well be a less restrictive alternative to COPA.[31]

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[31] Indeed, as the National Research Council's report noted:

> [T]he problem of protecting children from inappropriate material and experiences on the Internet is complex. . . .
>
> The effectiveness of technology—based on tools and social and educational strategies in practice, should be examined and characterized. Chapter 12 [of this Report] discussed one aspect of evaluating the performance of filters, based on a "head-to-head" comparison of how filters performed in blocking inappropriate materials. But protection of children is a holistic enterprise that must account for the totality

The existence of less restrictive alternatives renders COPA unconstitutional under strict scrutiny. As the Supreme Court has said:

> "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties . . . and the benefit gained must outweigh the loss of constitutionally protected rights.

Elrod v. Burns, 427 U.S. 347, 363, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 59, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973)).

* * * * * *

In sum, the District Court did not abuse its discretion in granting the plaintiffs a preliminary injunction on the grounds that COPA, in failing to satisfy strict scrutiny, had no probability of success on the merits. COPA is clearly a content-based restriction on speech. Although it does purport to serve a compelling governmental interest, it is not narrowly tailored, and thus fails strict scrutiny. COPA also fails strict scrutiny because it does not use the least restrictive means to achieve its ends. The breadth of the "harmful to minors" and "commercial purposes" text of COPA, especially in light of applying community standards to a global medium and the burdens on speech created by the statute's affirmative defenses, as well as the fact that Congress could

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of their Internet experience—which suggests the need for a examination of all of the tools in all of the venues in which children use the Internet.

YOUTH, PORNOGRAPHY AND THE INTERNET, *supra* note 29, at § 14.6.

have, but failed to employ the least restrictive means to accomplish its legitimate goal, persuade us that the District Court did not abuse its discretion in preliminarily enjoining the enforcement of COPA.

B. Overbreadth

Though the Supreme Court held in *Ashcroft* that COPA's reliance on community standards did not alone render the statute overbroad, the Court specifically declined to "express any view as to whether COPA suffers from substantial overbreadth for other reasons [or] whether the statute is unconstitutionally vague," instead explaining that "prudence dictates allowing the Court of Appeals to first examine these difficult issues." *Ashcroft*, 122 S. Ct. at 1713. In this Part, therefore, we discuss whether COPA is substantially overbroad, and hold that it is.[32]

In *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), the Supreme Court ruled that a statute that burdens otherwise protected speech is facially invalid if that burden is not only real, but "substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 615, 93 S. Ct. 2908. As the Court has recently stated, "The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected

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[32] The Supreme Court has explained that it has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines." *Kolender v. Lawson*, 461 U.S. 352, 358 n. 8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (citing *Keyishian v. Board of Regents*, 385 U.S. 589, 609, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967); *NAACP v. Button*, 371 U.S. 415, 433, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963)). We consider an aspect of the statute that we consider vague in note 37, *infra*.

speech is prohibited or chilled in the process." *Free Speech Coalition,* 122 S. Ct. at 1404.[33]

Our analysis of whether COPA is overbroad is akin to the portion of the strict scrutiny analysis we have conducted in which we concluded that COPA is not narrowly tailored. Overbreadth analysis—like the question whether a statute is narrowly tailored to serve a compelling governmental interest—examines whether a statute encroaches upon speech in a constitutionally overinclusive manner.

We conclude that the statute is substantially overbroad in that it places significant burdens on Web publishers' communication of speech that is constitutionally protected as to adults and adults' ability to access such speech. In so doing, COPA encroaches upon a significant amount of protected speech beyond that which the Government may target constitutionally in preventing children's exposure to material that is obscene for minors. *See Ginsberg,* 390 U.S. at 639-43, 88 S. Ct. 1274; *see also, e.g., Sable,* 492 U.S. at 126, 109 S. Ct. 2829;

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[33] In assessing facial challenges of overbreadth, as we do here, the courts have "altered [their] traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" *Broadrick,* 413 U.S. at 612, 93 S. Ct. 2908 (quoting *Dombrowski v. Pfister,* 380 U.S. 479, 486, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965)). This exception to traditional rules of standing "is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their right for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Los Angeles Police Dept. v. United Reporting Pub. Corp.,* 528 U.S. 32, 38, 120 S. Ct. 483, 145 L. Ed. 2d 451 (1999) (quoting *Gooding v. Wilson,* 405 U.S. 518, 520-521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)). The District Court held that the plaintiffs had standing. *See Reno II,* 31 F. Supp. 2d at 479. We agree. *See Reno III,* 217 F.3d at 171.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 212-14, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975).

1. "Material Harmful to Minors"

First, COPA's definition of "material harmful to minors" impermissibly places at risk a wide spectrum of speech that is constitutionally protected. As we have discussed in our strict scrutiny analysis, two of the three prongs of the "harmful to minors" test—the "serious value" and "prurient interest" prongs—contain requirements that material be "taken as a whole." *See* 47 U.S.C. § 231(e)(6)(C). We have earlier explained that the First Amendment requires the consideration of context. COPA's text, however, as we have interpreted it, *see* Part II.A.2(a), *supra*, calls for evaluation of "any material" on the Web *in isolation*. Such evaluation *in isolation* results in significant overinclusiveness. Thus, an isolated item located somewhere on a Web site that meets the "harmful to minors" definition can subject the publisher of the site to liability under COPA, even though the entire Web page (or Web site) that provides the context for the item would be constitutionally protected for adults (and indeed, may be protected as to minors).

An examination of the claims of certain amici curiae that COPA threatens their speech illustrates this problem. For example, amicus California Museum of Photography/University of California at Riverside, maintains a Web site that, among other things, displays artwork from the museum's collection. The Web site contains a page that introduces the "photographers" section of the Web site. *See* California Museum of Photography/University of California at Riverside, *UCR/CMP Photographers, at http://www.cmp.ucr.edu/ pho-*

tos/photographers.html (last visited Feb. 6, 2003).[34] This Web page contains several photographs, each which serves as a link to that museum's on-line exhibit on a particular photographer. One of these photographs on the introductory page, by Lucien Clergue, links to the museum's exhibit of his work. This photograph is of a naked woman whose "post-pubescent female breast," 47 U.S.C. § 231(e)(6)(B), is exposed.

Viewing this photograph "as a whole," but without reference to the surrounding context, as per COPA's definition of "material," the photograph arguably meets the definition of "harmful to minors." Yet, this same photograph, when treated in context as a component of the entire Web page, cannot be said to be "harmful to minors." In the context of the Web page, which displays several art exhibits, none of which are even arguably "harmful to minors," the Clergue photograph and its surroundings would have "serious [artistic] value." Of course, it would also be protected speech as to adults.[35]

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[34] The Web site page can be reached by accessing the museum's main Web page at *http://www.cmp.ucr.edu* and then by clicking on a link marked "photographers."

[35] Another such example is noted in the American Society of Journalists' amicus brief. *See* Br. of Amici Curiae American Society of Journalists and Authors et al. at 23 n. 19. The American Society points to the work of photographer Paul Outerbridge as displayed on the J. Paul Getty Museum Web site. The Web site includes a Web page featuring a discussion of Outerbridge and containing three small photographs, one of which is entitled "Woman with Meat Packer's Gloves." *See* J. Paul Getty Museum, *Paul Outerbridge (Getty Museum), http://www.getty.edu/art/collections/bio/a1971-1.html* (last visited Feb. 6, 2003). The museum describes this photograph as a ("disturbing image of a [naked] woman piercing her own breast and abdomen with the sharp tips of meat packer's gloves."). This photograph in isolation arguably meets COPA's "harmful to minors" definition. When viewed in the context of the Web page discussing the artist and displaying his other art work, however, this image, as a component of the Web page in its en-

As another example, amicus Safer Sex Institute publishes a Web site that contains sexual health and educational materials. On one page of this Web site is a textual description of how to use a condom with accompanying graphic drawings. *See* Safer Sex Institute, *safersex /a journal of safer sex, http://safersex.org/condoms/how. to.use/* (last visited Feb. 6, 2003). The page lists six steps for properly using a condom. Next to this text are four drawings that detail how to place a condom on the penis and how to remove it after sex. Three of these drawings each "exhibit[ ] . . . the genitals." 47 U.S.C. § 231(e)(6)(B). An evaluation of any of these three drawings alone, all of which depict an erect penis "as a whole," might lead to the conclusion that they fit the "harmful to minors" standard. Yet, these same drawings, viewed in the larger context of the Web page, which provides instruction on the proper use of a condom, is protected speech as to adults.[36] We also note that the same Web page provides links to other information within the same Web site of potential importance to adults (and possibly certain minors) regarding safe sex.

As these examples illustrate—and they are but a few of the very many produced by the plaintiffs and the amici—the burden that COPA would impose on harmless material accompanying such single images causes COPA to be substantially overinclusive.

2. "Minor"

As we have earlier explained, the term "minor" appears in all three prongs of the statute's modified-forminors *Miller* test. COPA's definition of a "minor" as

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tirety, does not meet the "harmful to minors" standard.

[36] Indeed, though we do not reach this issue, we note that this speech may not even be obscene as to minors, at least as to older minors, because it arguably has "serious value" for them.

any person under the age of seventeen serves to place at risk too wide a range of speech that is protected for adults. The type of material that might be considered harmful to a younger minor is vastly different—and encompasses a much greater universe of speech—than material that is harmful to a minor just shy of seventeen years old.

Thus, for example, sex education materials may have "serious value" for, and not be "patently offensive" as to, sixteen-year-olds. The same material, however, might well be considered "patently offensive" as to, and without "serious value" for, children aged, say, ten to thirteen, and thus meet COPA's standard for material harmful to minors.

Because COPA's definition of "minor" therefore broadens the reach of "material that is harmful to minors" under the statute to encompass a vast array of speech that is clearly protected for adults—and indeed, may not be obscene as to older minors—the definition renders COPA significantly overinclusive.[37]

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[37] We also consider the use of the term "minor," as incorporated in COPA's definition of "material that is harmful to minors," to be impermissibly vague. A statute is void for vagueness if it "forbids ... the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "[S]tandards of permissible statutory vagueness are strict in the area of free expression. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *Button*, 371 U.S. at 432-33, 83 S. Ct. 328. *See also Reno I*, 521 U.S. at 871-72, 117 S. Ct. 2329 (because the CDA was "a content-based regulation of speech," its "vagueness . . . raise[d] special First Amendment concerns because of its obvious chilling effect on free speech"). COPA's definition of "minor" includes all children un-

3. "Commercial Purposes"

COPA's purported limitation of liability to persons making communications "for commercial purposes" does not narrow the sweep of COPA sufficiently. Instead, the definition subjects too wide a range of Web publishers to potential liability. As we have explained, under the plain language of COPA, a Web publisher will be subjected to liability due to the fact that even a small part of his or her Web site has material "harmful to minors." Furthermore, because the statute does not require that a Web publisher seek profit as a sole or primary objective, COPA can reach otherwise non-commercial Web sites that obtain revenue through advertising. We have explored this subject in greater detail in the strict scrutiny section of this opinion. The conclusion we reach there is every bit as relevant here.

4. Affirmative Defenses

The affirmative defenses do not save the statute from sweeping too broadly. First, the affirmative defenses, if employed by Web publishers, will result in a chilling effect upon adults who seek to view, and have a right to access, constitutionally protected speech. Compliance with COPA's affirmative defenses requires that Web

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der the age of seventeen, as we have noted. Because the statute's definition of minor is all-inclusive, and provides no age "floor," a Web publisher will be forced to guess at the bottom end of the range of ages to which the statute applies. The fearful Web publisher therefore will be forced to assume, and conform his conduct to, the youngest minor to whom the statute conceivably could apply. We cannot say whether such a minor would be five years of age, three years, or even two months. Because we do not think a Web publisher will be able to make such a determination either, we do not think that they have fair notice of what conduct would subject them to criminal sanctions under COPA. As a result of this vagueness, Web publishers will be deterred from engaging in a wide range of constitutionally protected speech. The chilling effect caused by this vagueness offends the Constitution.

publishers place obstacles in the way of adults seeking to obtain material that may be considered harmful to minors under the statute. As the District Court found, these barriers, which would require adults to identify themselves as a precondition to accessing disfavored speech, are likely to deter many adults from accessing that speech.

Second, the affirmative defenses impose a burden on Web publishers, and as such, do not alleviate the chilling effect that COPA has on their speech. Web publishers will be forced to take into account the chilling effect that COPA's affirmative defenses have on adult Web users. Consequently, COPA will cause Web publishers to recoil from engaging in such expression at all, rather than availing themselves of the affirmative defenses. Additionally, the financial costs of implementing the barriers necessary for compliance with COPA may further deter some Web publishers from posting protected speech on their Web sites.

Moreover, because the affirmative defenses are not included as elements of the statute, Web publishers are saddled with the substantial burden of proving that their "conduct falls within the affirmative defense." *Free Speech Coalition,* 122 S. Ct. at 1404.

Thus, the affirmative defenses do not cure nor diminish the broad sweep of COPA sufficiently.

5. "Community Standards"

As the Supreme Court has now explained, community standards by itself did not suffice to render COPA substantially overbroad. Justice Kennedy's concurring opinion, however, explained that community standards, in conjunction with other provisions of the statute, might render the statute substantially overbroad. *See Ash-*

croft, 122 S. Ct. at 1720 (Kennedy, J., concurring) ("We cannot know whether variation in community standards renders the Act substantially overbroad without first assessing the extent of the speech covered and the variations in community standards with respect to that speech.").

As we have just discussed earlier, the expansive definitions of "material harmful to minors" and "for commercial purposes," as well as the burdensome affirmative defenses, likely render the statute substantially overbroad. COPA's application of "community standards" exacerbates these constitutional problems in that it further widens the spectrum of protected speech that COPA affects. As we said in our original decision, "COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability." *Reno III*, 217 F.3d at 166; *see also Ashcroft*, 122 S. Ct. at 1719 (Kennedy, J., concurring) ("if an eavesdropper in a more traditional, rural community chooses to listen in, there is nothing the publisher can do. As a practical matter, COPA makes the eavesdropper the arbiter of propriety on the Web.").

The "community standards" requirement, when viewed *in conjunction with* the other provisions of the statute—the "material harmful to minors" provision and the "commercial purposes" provisions, as well as the affirmative defenses—adds to the already wide range of speech swept in by COPA. Because the community standards inquiry further broadens the scope of speech covered by the statute, the limitations that COPA purports to place on its own reach are that much more ineffective.

6. Unavailability of Narrowing Construction

Before concluding that a statute is overbroad, we are required to assess whether it is subject to "a narrowing construction that would make it constitutional." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). We may impose such a narrowing construction, however, "only if it is readily susceptible to such a construction," *Reno I*, 521 U.S. at 884, 117 S. Ct. 2329, because courts "will not rewrite a . . . law to conform it to constitutional requirements." *American Booksellers*, 484 U.S. at 397, 108 S.Ct. 636. As the Supreme Court once noted, "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese*, 92 U.S. 214, 221, 23 L. Ed. 563 (1875).

We originally declined to redraw COPA when we held that the "contemporary community standards" rendered the statute overbroad; we certainly decline to perform even more radical surgery here. In order to satisfy the constitutional prerequisites consistent with our holding today, we would be required, *inter alia*, to redraw the text of "commercial purposes" and redraw the meaning of "minors" and what is "harmful to minors," including the reach of "contemporary community standards." We would also be required to redraw a new set of affirmative defenses. Any attempt to resuscitate this statute would constitute a "serious invasion of the legislative domain." *United States v. National Treasury Employees Union*, 513 U.S. 454, 479 n. 26, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995).

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Accordingly, we hold that the plaintiffs will more probably prove at trial that COPA is substantially overbroad, and therefore, we will affirm the District Court on this independent ground as well.

III.

This appeal concerns the issuance of a preliminary injunction pending the resolution of the merits of the case. Because the ACLU will likely succeed on the merits in establishing that COPA is unconstitutional because it fails strict scrutiny and is overbroad, we will affirm the issuance of a preliminary injunction.

APPENDIX A

CHILD ONLINE PROTECTION ACT

47 U.S.C. § 231

Restriction of access by minors to materials commercially distributed by means of world wide web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a), a person shall not be considered to make any communication for commercial purposes to the extent that such person is

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) or section 230 shall not con-

stitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a)—

(A) shall not disclose any information collected for the purposes of restricting access to such commu-

nications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection, the following definitions shall apply:

(1) By means of the world wide web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected world-wide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

(5) Internet information location tool

The term "Internet information location tool" means a service that refers or links users to an online location on the World Wide Web. Such term includes directories, indices, references, pointers, and hypertext links.

(6) Material that is harmful to minors

The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or postpubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

APPENDIX E

1. Section 231 of the Communications Act of 1934, 47 U.S.C. 231, provides as follows:

Restriction of access by minors to materials commercially distributed by means of World Wide Web that are harmful to minors

(a) Requirement to restrict access

(1) Prohibited conduct

Whoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors shall be fined not more than $50,000, imprisoned not more than 6 months, or both.

(2) Intentional violations

In addition to the penalties under paragraph (1), whoever intentionally violates such paragraph shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3) Civil penalty

In addition to the penalties under paragraphs (1) and (2), whoever violates paragraph (1) shall be subject to a civil penalty of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(b) Inapplicability of carriers and other service providers

For purposes of subsection (a) of this section, a person shall not be considered to make any communication for commercial purposes to the extent that such person is—

(1) a telecommunications carrier engaged in the provision of a telecommunications service;

(2) a person engaged in the business of providing an Internet access service;

(3) a person engaged in the business of providing an Internet information location tool; or

(4) similarly engaged in the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication made by another person, without selection or alteration of the content of the communication, except that such person's deletion of a particular communication or material made by another person in a manner consistent with subsection (c) of this section or section 230 of this title shall not constitute such selection or alteration of the content of the communication.

(c) Affirmative defense

(1) Defense

It is an affirmative defense to prosecution under this section that the defendant, in good faith, has restricted access by minors to material that is harmful to minors—

(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;

(B) by accepting a digital certificate that verifies age; or

(C) by any other reasonable measures that are feasible under available technology.

(2) Protection for use of defenses

No cause of action may be brought in any court or administrative agency against any person on account of any activity that is not in violation of any law punishable by criminal or civil penalty, and that the person has taken in good faith to implement a defense authorized under this subsection or otherwise to restrict or prevent the transmission of, or access to, a communication specified in this section.

(d) Privacy protection requirements

(1) Disclosure of information limited

A person making a communication described in subsection (a) of this section—

(A) shall not disclose any information collected for the purposes of restricting access to such communications to individuals 17 years of age or older without the prior written or electronic consent of—

(i) the individual concerned, if the individual is an adult; or

(ii) the individual's parent or guardian, if the individual is under 17 years of age; and

(B) shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the person making such communication and the recipient of such communication.

(2) Exceptions

A person making a communication described in subsection (a) of this section may disclose such information if the disclosure is—

(A) necessary to make the communication or conduct a legitimate business activity related to making the communication; or

(B) made pursuant to a court order authorizing such disclosure.

(e) Definitions

For purposes of this subsection,[1] the following definitions shall apply:

(1) By means of the World Wide Web

The term "by means of the World Wide Web" means by placement of material in a computer server-based file archive so that it is publicly accessible, over the Internet, using hypertext transfer protocol or any successor protocol.

(2) Commercial purposes; engaged in the business

(A) Commercial purposes

A person shall be considered to make a communication for commercial purposes only if such person is engaged in the business of making such communications.

---

[1] So in original. Probably should be "section,".

(B) Engaged in the business

The term "engaged in the business" means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income). A person may be considered to be engaged in the business of making, by means of the World Wide Web, communications for commercial purposes that include material that is harmful to minors, only if the person knowingly causes the material that is harmful to minors to be posted on the World Wide Web or knowingly solicits such material to be posted on the World Wide Web.

(3) Internet

The term "Internet" means the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information.

(4) Internet access service

The term "Internet access service" means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services.

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The term "material that is harmful to minors" means any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

(7) Minor

The term "minor" means any person under 17 years of age.

2. Section 1402 of the Child Online Protection Act, Pub. L. No. 105-277, Div. C, Tit. XIV, 112 Stat. 2681-736, provides as follows:

CONGRESSIONAL FINDINGS

The Congress finds that—

(1) while custody, care, and nurture of the child resid[e] first with the parent, the widespread availability of the Internet presents opportunities for minors to access materials through the World Wide Web in a manner that can frustrate parental supervision or control;

(2) the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest;

(3) to date, while the industry has developed innovative ways to help parents and educators restrict material that is harmful to minors through parental control protections and self-regulation, such efforts have not provided a national solution to the problem of minors accessing harmful material on the World Wide Web;

(4) a prohibition on the distribution of material harmful to minors, combined with legitimate de-

fenses, is currently the most effective and least restrictive means by which to satisfy the compelling government interest; and

(5) notwithstanding the existence of protections that limit the distribution over the World Wide Web of material that is harmful to minors, parents, educators, and industry must continue efforts to find ways to protect children from being exposed to harmful material found on the Internet.

113 (3) 08-565

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

Supreme Court of the United States

MICHAEL B. MUKASEY, in his capacity as Attorney General of the United States,

Petitioner,

—v.—

AMERICAN CIVIL LIBERTIES UNION; AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION; ADDAZI, INC., d/b/a CONDOMANIA; ELECTRONIC FRONTIER FOUNDATION; ELECTRONIC PRIVACY INFORMATION CENTER; FREE SPEECH MEDIA; PHILADELPHIA GAY NEWS; POWELL'S BOOKSTORES; SALON MEDIA GROUP, INC.; HEATHER CORINNA; NERVE.COM, INC.; AARON PECKHAM, d/b/a URBAN DICTIONARY LLC; PUBLIC COMMUNICATORS, INC.; SEXUAL HEALTH NETWORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Child Online Protection Act (COPA), which criminalizes a large amount of speech on the World Wide Web that adults are entitled to communicate and receive, violates the First Amendment to the U.S. Constitution.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. In addition to the parties listed in the caption the following plaintiffs are no longer parties to this proceeding: Androgyny Books, Inc., d/b/a A Different Light Bookstores; Planetout, Inc.; and Dan Savage. Their names were erroneously included on the Third Circuit caption.

CORPORATE DISCLOSURE STATEMENT

In accordance with FRAP 26.1 and LAR 26.1 Plaintiffs make the following disclosures:

The following plaintiffs do not have parent companies, nor do any publicly held companies own ten percent or more of their stock: American Civil Liberties Union, Aaron Peckham d/b/a Urban Dictionary, Public Communicators, Inc., Free Speech Media, Sexual Health Network, Salon Media Group, Inc., Powell's Bookstore, Philadelphia Gay News, Nerve.com Inc., Electronic Privacy Information Center, Electronic Frontier Foundation, Addazi, Inc., d/b/a Condomania, American Booksellers Foundation for Free Expression.

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RESPONDENTS' BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, the respondents American Civil Liberties Union *et al.*, hereby submit this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF THE CASE

The Child Online Protection Act (COPA), 47 U.S.C. § 231, makes it a crime to engage in certain non-obscene speech about sex on the World Wide Web. All parties agree that this speech is constitutionally protected for adults. The district court found, and the government does not dispute, that the statute criminalizes valuable speech, including speech by the plaintiffs. App. 119a-121a. According to the government's experts in this case, COPA could criminalize as many as 700 million Web pages. App. 77a.

The district court accurately summarized the statute. App. 57a-61a. COPA provides civil and criminal penalties for anyone who engages in speech that is "harmful to minors" on the Web if that speech is "available to any minor." 47 U.S.C. § 231 (a)(2), (3). "Harmful to minors" is defined as speech that is "patently offensive" to minors, "prurient" to minors, and lacks certain "value" for minors. 47 U.S.C. § 231(e)(6). The statute applies to any speaker on the Web who has the "objective of earning a profit." 47 U.S.C. § 231 (e)(2)(b). Speakers may not be held liable if they "in good faith, [h]ave restricted access by minors to material that is harmful to minors" by use of a credit card or personal identification screen

(or by other techniques that all parties agree are unavailable). 47 U.S.C. § 231(c)(1).

COPA was signed into law in late 1998. On February 1, 1999, following an evidentiary hearing, the district court preliminarily enjoined enforcement of COPA. *ACLU v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999). The court of appeals affirmed the preliminary injunction on the single ground that COPA's reliance on "community standards" was likely to render the statute unconstitutional. *ACLU v. Reno*, 217 F.3d 162, 166 (3rd Cir. 2000). This Court reversed, holding that this flaw alone did not mean the statute was likely to be found unconstitutional. *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002). However, the Court left the preliminary injunction in effect and remanded for the court of appeals to consider any other issues concerning the constitutionality of statute. *Id.* at 585-86.

On remand, the court of appeals reaffirmed its conclusion that COPA was likely to be found unconstitutional, citing many flaws in the statute. *ACLU v. Ashcroft*, 322 F.3d 240 (3rd Cir. 2003); App. 150a-206a. This Court affirmed. *Ashcroft v. ACLU*, 542 U.S. 656 (2004). In doing so, the Court outlined the legal principles to be applied to the analysis of COPA. *Id.* at 665-67. Most notably, the Court held that "[b]locking and filtering software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them." *Id.* at 666-67. Because it was reviewing a preliminary injunction record that was several years old, the Court remanded the case to the district court

for a trial on the merits to determine if the evidence still supported its conclusion about COPA's unconstitutionality. *Id.* at 670-73.

The trial in the district court lasted more than four weeks. The district court heard the testimony of 38 witnesses, including twelve experts, and 172 exhibits were admitted. Once again, the district court ruled that the statute is unconstitutional. App. 55a-147a. In support of its conclusion, the district court made over 180 specific factual findings.

On the central issue identified by this Court – the effectiveness of the less restrictive alternative of filtering software – the district court made over 50 factual findings, each of which was fully supported by the evidence. App. 79a-96a. Specifically, the district court found that: (1) filtering software blocks "about 95 percent of sexually explicit material" and is "quite effective and accurate at blocking sexually explicit material, especially the most popular Web content," App. 92a, 96a; (2) according to defendants' own experts, one filtering software product (AOL) "blocked 98.7 percent of sexually explicit Web pages" and "of the filters tested, only two failed to block at least 90 percent of the sexually explicit Web pages and the vast majority blocked at least 95 percent of such pages," App. 94a-95a; and (3) two separate Congressionally commissioned reports found filters effective, App. 93a-94a. *See also ACLU v. Gonzales*, 478 F. Supp. 2d 775, 796 (E.D.Pa. 2007); *Ashcroft v. ACLU*, 542 U.S. at 668.

The district court further found that filters are far more effective in screening sexually explicit material than COPA's reliance on criminal law

enforcement. First, filters block overseas sites that cannot legally or practically be prosecuted in United States courts. App. 84a., 98a-100a, 124a-126a. Relying on "not dissimilar" statistics presented by experts for both parties, the district court found that "a substantial number (approximately 50 percent) of sexually explicit web-sites are foreign in origin" and that percentage is increasing. App. 77a-79a. Second, filters can be used to block access to "material that is distributed on the Web and on other widely used parts of the Internet" through computer protocols not covered by COPA. App. 82a, 98a. This includes such popular forms of Internet speech as peer-to-peer, email, instant messaging, and streaming video, none of which are covered by COPA. Third, filters block non-commercial sites that COPA does not reach. App. 59a.

The district court also made a number of other findings directly addressing the effectiveness of filters. As found by the district court, filters are "widely available and easy to obtain." App. 86a. Filters are "fairly easy to install, configure, and use and require only minimal effort by the end user." App. 87a. Filters can be customized to the needs and values of the parent as well as the age and maturity of the child. App. 80a. "It is difficult for children to circumvent filters." App. 92a. And, "85 percent of parents [who use AOL filters] are highly satisfied." App. 89a.

The district court's lengthy and thorough opinion did not limit itself to an analysis of filtering technology but analyzed every aspect of COPA, both factual and legal. The court found the statute

unconstitutional not only because filters represent a less restrictive and more effective alternative, but for other reasons as well. Summarizing its holding, the district court said:

> COPA facially violates the First and Fifth Amendment rights of the plaintiffs because: (1) COPA is not narrowly tailored to the compelling interest of Congress; (2) defendant has failed to meet his burden of showing that COPA is the least restrictive and most effective alternative in achieving the compelling interest; and (3) COPA is impermissibly vague and overbroad.

App. 146-47a.

The court of appeals affirmed, ruling that the district court had correctly identified and applied the relevant legal standards established by this Court in its remand order. App. 2a-52a. The Third Circuit's holding was based in large part on the district court's factual findings. The government did not challenge any of those findings, and none were found clearly erroneous by the court of appeals. See App. 41a.

In its petition, the government makes much of the court's application of the law-of-the-case doctrine. App. 9a-15a. The court of appeals did not, however, rely solely on that doctrine in finding COPA unconstitutional. As the court of appeals explained: "We reach our result both through the application of the law-of-the-case doctrine to our determination in *ACLU II* and on the basis of our independent analysis of COPA and would reach the same result on either basis standing alone." App. 52a. Perhaps

even more significantly, on the issue of filtering software, the court of appeals held "we would reach this conclusion on the basis of either the prior litigation *or* the district court's findings on the remand." App. 46a (emphasis added). Finally, the court of appeals recognized that it was not bound by the law-of-the-case doctrine if either the law or the facts had changed, or if to do so would perpetuate "clear error or manifest injustice." App. 11a. It concluded that none of those conditions applied.

SUMMARY OF THE ARGUMENT

This case has already been before this Court twice and the legal principles are well-established. The Court remanded for the purpose of obtaining updated facts. The district court made extensive findings, which the government does not challenge and only reinforce the findings from the preliminary injunction stage. After 10 years of litigation, the decision below broke no new ground. The courts below conducted the factual inquiry that this Court directed and then faithfully applied the legal standards that this Court articulated. There is simply no need for this Court, yet again, to explain the constitutional flaws of a statute that has been enjoined since its passage. There is nothing more to be decided in this case and the petition for certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ALREADY RESOLVED THE LEGAL PRINCIPLES APPLICABLE TO THIS CASE.

This Court has already set out all of the law necessary to resolve this case, not only through holdings in similar cases but in its two prior opinions in this very case.

First, COPA is a content-based criminal prohibition on speech, and such restrictions are "presumed invalid" because they have the "constant potential to be a repressive force in the lives and thoughts of a free people." *Ashcroft v. ACLU*, 542 U.S. at 660. *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992).

Second, a statute is not "narrowly tailored" if it is significantly overinclusive, *Simon and Schuster v. Members of NYS Crime Victims Board*, 502 U.S. 105, 121 (1991), or if it is significantly underinclusive, *Arkansas Writer's Project Inc. v. Ragland*, 481 U.S. 221, 232 (1987); *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557, 564 (1980) (law "may not be sustained if it provides only ineffective or remote support for the government's purpose"); *Turner Broadcasting Syst. v. FCC*, 512 U.S. 622, 624 (1994) (defendant has burden of showing statute will in fact alleviate the alleged harms in a "direct and material way").

Third, because COPA "effectively suppresses a large amount of speech that adults have a

constitutional right to receive and to address to one another," it is "unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose the statute was enacted to serve." *Ashcroft v. ACLU*, 542 U.S. at 665. *See also Bolger v. Youngs Drug Products*, 463 U.S. 60, 74 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox"); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Butler v. Michigan*, 352 U.S. 380 (1957). *Cf. Ginsberg v. State of NY*, 390 U.S. 629, 634-35 (1968) (upholding restriction on direct sale to minors because it "does not bar the appellant from stocking the magazines and selling them" to adults).

Fourth, "the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute." *Ashcroft v. ACLU*, 542 U.S. at 665. In measuring the effectiveness of alternatives,

> [t]he test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Id. at 666.

Applying these well-settled principles to its review of the preliminary injunction, this Court concluded that "[f]ilters are less restrictive than COPA." *Id.* at 667.

> [Filters] impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished.

Id.

This Court also recognized that filters "may well be more effective than COPA." *Id.* As this Court explained, "COPA does not prevent minors from having access to . . . foreign harmful materials," whereas "a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America." *Id.* In addition, this Court noted that the "[e]ffectiveness" of COPA's criminal prohibitions "is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas." *Id.* Finally, this Court observed that filters, unlike

COPA, "can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web." *Id.* at 668.

This Court's reference to the factual record was understandably tentative because the Court was reviewing a preliminary injunction and was concerned that the record then before it might "not reflect current technological reality" due to the passage of time. *Id.* at 671.

There was nothing tentative, however, about this Court's discussion of narrow tailoring or the legal principles on which it is based. In seeking review from this Court for a third time, the government attempts to manufacture a legal issue by contending that ". . . the relevant comparison is between COPA and measures to encourage the use of filters," not between COPA and filters as an "effective alternative." Petition at 27-28. This Court's prior holding rejects the government's argument. *Ashcroft v. ACLU*, 542 U.S. at 668-69. In any event, the government appears to concede that it had the burden of establishing that "measures to encourage the use of filters" were not "effective alternatives." Petition at 27-28. The government made no attempt to meet that burden. Despite that failure, its complaint that the lower courts ignored the subject (Petition at 28) is incorrect (App. 44a).[1]

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[1] It is worth noting that the government spent $1 million dollars on a study designed to meet the question defined by this Court, which the government now claims to be the wrong question: whether or not filters are effective.

In short, this case currently presents no new issues of law for the Court to resolve. Accordingly, there is no reason for this Court to grant the petition.

II. THE DISTRICT COURT'S PROPER APPLICATION OF THE LEGAL PRINCIPLES PREVIOUSLY ANNOUNCED BY THIS COURT COMPEL THE CONCLUSION THAT COPA IS UNCONSTITUTIONAL.

This Court remanded this case for the district court to make up-to-the-date findings about the relative effectiveness of COPA and filters. *Ashcroft v. ACLU*, 542 U.S. at 670-73. The district court did so extensively. The district court found that approximately 50 percent of all "sexually explicit" speech originates overseas, that COPA does not cover speech from overseas and that, even if it did, COPA's criminal provisions could not be enforced against such speech as a practical matter.[2] App. 77a-78a, 124a-127a. The district court also found that COPA does not reach many Internet applications such as peer-to-peer, email, instant messaging, and streaming video. App. 98a. And, by definition, COPA does not reach non-commercial speech. 47 U.S.C. § 231 (e)(2)(b). The evidence was clear that

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[2] The government argues that in the most technical sense it can attempt to enforce the statute overseas. The argument is unpersuasive for the reasons stated by the district court and has been rejected by this Court. App. 124a-127a; *Ashcroft v. ACLU*, 542 U.S. at 667. However, whether or not the legal assertion is correct, the government appears to concede that practical considerations will prevent enforcement against speech originating overseas. Petition at 30.

sexually explicit speech occurs in all of these forms. App. 124a-27a.

By contrast, the district court found that filters would reach all of these forms of speech, and would reach overseas as well as domestic sites. App. 82a, 84a. Significantly, the district court cited the government's own study in finding that filters are approximately 95% effective, and are most effective in blocking the most popular web pages that are accessed through commonly used search terms. App. 94a-95a.

The government does not dispute these facts, which establish even more firmly facts that this Court already deemed sufficient to affirm the preliminary injunction. *Ashcroft v. ACLU*, 542 U.S. at 657. Instead, the government places almost exclusive reliance on its assertion that only 50 percent of parents use filters.[3] The government's argument is unpersuasive on multiple grounds. First, even assuming the accuracy of the government's statistic, it does not belie the fact that filters are more effective than a criminal statute that does not reach oversees sites, non-commercial sites, or non-web based speech. Second, the number of parents using filters has increased by 65% within the past four years. Tr. 10/24/06, at 88-90 (Cranor). Third, parents choose not to use filters for many reasons. Studies introduced at trial reveal that the

[3] The government also argues that filters overblock and that this overblocking will discourage parents from using filters. The government fails to inform the Court that the district court expressly found its evidence on overblocking unreliable. App. 95a-96a.

number one reason why parents do not use filters is they trust their children and do not see a need to block any content. Tr, 10/24/06, at 90-91, 133-34 (Cranor); Tr. 10/31/06, at 219 (Whittle); PX 85, at 0049. One study, which allowed multiple responses, found that 60 percent of parents do not use filters because they trust their children, 53 percent do not use filters because they check up on their children's activities in other ways, and 40 percent do not use filters because the computer is in a public place in the home. Pl. Exh. 85, at 0049. Fourth, and most fundamentally, the government's argument rests on the unstated assumption that it has a compelling interest in overriding the decisions of parents. This Court has already effectively rejected that argument. *U.S. v. Playboy Entm't Group Inc.*, 529 U.S. 803, 824 (2000); *Ashcroft v. ACLU*, 542 U.S. at 670 ("COPA presumes that parents lack the ability, not the will, to monitor what their children see.").

As both lower courts found, COPA is undeniably less effective than filters. Even judged in the absence of filters, COPA does nothing to advance the government's asserted interest. The government's claim to the contrary rests on the assertion than half a loaf is better than nothing. The government argues that COPA serves a worthwhile purpose even if 50% of all sexually explicit web sites are hosted overseas and thus beyond COPA's reach. Whatever merits that argument may have in other contexts, it makes no sense here and rests on a fundamental misunderstanding of how the Internet functions.

Content on the Internet is typically accessed through a search engine, such as Google. A Google search for the United States Supreme Court produces over 8 million "hits." Reducing this number by half is unlikely to have any impact on the amount of information available about the Supreme Court or the ease of obtaining it (especially if the reduction is based on the location of the host site rather than an analysis of the site's content). This is even more true for the sexually explicit speech that COPA addresses. Without COPA, according to the government, someone seeking sexually explicit speech on the Internet has access to a Google list of 700,000,000 pages, which is a mixture of domestic and foreign. App. 77a. If COPA works perfectly, someone seeking sexually explicit speech on the Internet will still have access to a Google list of 350,000,000 pages, all of them foreign. The fact that these pages are generated overseas rather than in the United States is unlikely to make any difference to the person doing the search. The search does not take any longer, access to a web page is equally simple, the volume of speech is still obviously more than one person can absorb, and there is no reason to assume that there is any meaningful difference between the sexually explicit content available on foreign sites and domestic sites.

Whatever the effect may be on domestic sites versus sites originating overseas, moreover, COPA will have no effect on such wildly popular forms of Internet speech as video, email, and peer-to-peer communications. A minor seeking sexually explicit speech on the Internet is unlikely even to notice the

difference between a world in which COPA applies and one where it does not. That will most emphatically not be true of a minor whose parents have installed a filter.

Although COPA will be demonstrably ineffective in advancing the government's interest, the unique and constitutionally protected speech that plaintiffs offer on the Internet will by severely diminished if not entirely eliminated by COPA's threat of criminal prosecution. For example, the district court found, and the government does not dispute, that Salon and Nerve, popular online magazines with standing to challenge COPA, may have to self-censor to avoid prosecution. App. 120a-21a. Thus, COPA produces a clear First Amendment injury with no corresponding benefit for the goals that COPA is ostensibly meant to achieve.

Given this Court's prior rulings and the record compiled on remand, the conclusion that COPA is unconstitutional is inescapable and does not merit a third round of review by this Court.

III. THE LEGAL ISSUES RAISED BY THE GOVERNMENT ARE LARGELY IRRELEVANT TO THE CENTRAL UNCONSTITUTIONALITY OF THE STATUTE.

In an effort to find a legal issue that merits review by this Court, the government argues that the lower courts misinterpreted or failed to credit the significance of four provisions of COPA. The careful examination of each of these provisions by the lower courts persuasively demonstrates that their

interpretations were correct. More importantly for purposes of this petition, each of the asserted errors are irrelevant, as this Court has already held, to the overwhelming evidence that filters are less restrictive and more effective than COPA. *Ashcroft v. ACLU*, 542 U.S. at 667-68.

First, the government asserts that the lower courts misinterpreted the term "commercial purposes" in COPA. Petition at 21. Emphasizing that the statute's definition of "commercial purposes" includes a provision that the posting of harmful to minors material be part of "a regular course" of business, the government urges that the statute be interpreted to mean that no criminal charges could be brought if the speech was "occasional or sporadic." Petition at 21; 47 U.S.C. § 231(e)(2)(b). Setting aside the obvious vagueness of the government's proposed new gloss on the statute, the lower courts carefully considered the government's argument and correctly rejected it. App. 176a-79a; 138a-39a, 19a-20a. More importantly, even assuming *arguendo* that the government's interpretation might slightly limit the number of web pages subject to COPA, it does not alter the fact that COPA is more destructive and less effective than filters for the universe of speech still covered by the statute.

Second, the government argues that the lower courts misinterpreted the definition of "minors," which the statute defines as "any person under 17 years of age." 47 U.S.C. § 231 (e)(7). According to the government, this unmodified statutory language should be interpreted to include only "older minors." Petition at 23. However, the government expressly

refused to further define "older minors" and refused to interpret it to mean 16 year olds. Petition at 22-24. Once again the government's gloss raises vagueness problems. After careful consideration of the government's argument and its attendant vagueness problems, the lower courts have consistently rejected it and correctly interpreted the term "minor" to include "an infant, a five-year old, or a person just shy of age seventeen." App. 18a, 48a, 50a, 139a-40a, 171a-75a, 139a-40a. And, once again, the government's proposed re-definition of the term "minors," even if accepted, would do no more than somewhat limit the number of web pages covered by COPA. For those pages that are covered, the statute would still be more restrictive and less effective than filters.

Third, the government argues that the lower courts misinterpreted and undervalued the "as a whole" language that is found in the prurience and value prongs (but not the patently offensive prong) of COPA's definition of "material that is harmful to minors." 47 U.S.C. § 231 (e)(6); Petition at 31. This Court has already noted the difficulty of applying the term "as a whole" to the World Wide Web. *Ashcroft v. ACLU*, 535 U.S. at 592-93. The government offers no supplemental interpretation except to recite the previously failed argument that the term requires material to be viewed in "context." Petition at 31. At trial, the government judged whether material was harmful to minors or not based solely on an individual web page. Tr. 111/7/06, at 206-07 (Mewett). The lower courts carefully analyzed this statutory provision and correctly interpreted and

applied it. App. 169a-71a, 141a-42a, 49a-50a. Depending on what "context" means, the government's proposed interpretation might decrease or even increase the number of web pages subject to criminal and civil prosecution under COPA. Regardless of the effect, with respect to the pages that are covered, the statute would still be more restrictive and less effective than filters.

Perhaps the government is arguing that if all three of these interpretations were adopted, COPA would cover so few pages that its constitutional deficiencies would be some form of harmless error. It is hard to credit such an argument when the government has now conceded that the statute reaches the valuable speech of at least some of the plaintiffs, and the government's own evidence at trial claimed that up to 700 million web pages were sexually explicit and thereby covered by COPA.[3] But, if the central question on this petition is whether a statute is constitutional if it criminalizes constitutionally protected speech when there are less restrictive, more effective means of achieving the government's purpose, then the statute is unconstitutional whether the speaker goes to jail for posting 700 million pages or just one.

Finally, the government emphasizes the statutory defenses. A web speaker may avoid

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[3] The government's $1 million study was designed to identify "sexually explicit" pages, not pages that are "harmful to minors." Because the government introduced it for the purpose of evaluating the effectiveness of filters as opposed to COPA, the government implicitly conceded that it viewed the terms as synonymous.

prosecution by making the speech unavailable to anyone who does not enter a credit card number (or adult access code) into the web page. 47 U.S.C. § 231(c)(1). The district court took a great deal of testimony on the availability and utility of the defenses and made over 50 specific findings of fact, none of which the government argues are clearly erroneous. App. 101a-18a. The court of appeals affirmed. App. 179a-85a. The government does not dispute that adults will be deprived of constitutionally protected speech as a result of the defenses. App. 12a, 110a-18a, 127a-28a. Moreover, the government concedes that the defenses are so flawed that they will not prevent minors from having access to material covered by COPA and then surprisingly argues that the failing is irrelevant. Petition at 24-26. The government's view renders COPA even less effective and does not diminish the established effectiveness of filters.

In short, the government's attempt to re-write the statute is wrong, but, even if correct, would not alter the inescapable constitutional deficiencies of COPA. For the same reasons that these legal questions did not prevent this Court from affirming the preliminary injunction, there is no reason for this Court to grant the government's petition to address legal questions that cannot transform COPA into a constitutional statute, no matter how they are resolved. This Court does not issue advisory opinions. In the end, an advisory opinion is all that the government is seeking.

CONCLUSION

For all the reasons stated above, Respondents' respectfully request that this Court deny the petition for review.

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In the Supreme Court of the United States

MICHAEL B. MUKASEY, ATTORNEY GENERAL OF THE UNITED STATES, PETITIONER

v.

AMERICAN CIVIL LIBERTIES UNION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The court of appeals has affirmed a nationwide injunction invalidating an important Act of Congress whose constitutionality this Court has already seen fit to review. Indeed, the court of appeals has permanently precluded the Act's enforcement "at any time for any conduct." Pet. App. 148a. That sweeping decision is not only erroneous but, if allowed to stand, will leave millions of children without the protection that Congress carefully crafted against the harmful effects of commercially marketed pornography on the World Wide Web.

Respondents contend that the court of appeals should have the last word on the constitutionality of the Child Online Protection Act (COPA), Pub. L. No. 105-277, Div. C, Tit. XIV, 112 Stat. 2681-736 (47 U.S.C. 231 & note), and insist that this Court has already settled the relevant legal

principles. But the legal principles that the court of appeals treated as settled were primarily drawn from its *own* prior panel opinion, an opinion that this Court pointedly declined to endorse when this case was previously before it.

Far from resolving COPA's constitutionality, this Court examined only one question at the preliminary-injunction stage—whether the promotion of filter software might be a superior alternative to COPA—and it deemed the record inadequate to determine the answer. That question remains a key issue, as respondents acknowledge. Indeed, they offer scant defense of the court of appeals' rulings on other issues. This Court invited the government to demonstrate that promoting filters will not cover the necessary ground, and it has done so.

The court of appeals critically erred in considering that crucial issue. Nearly half of all parents do not use filters; that figure is undisputed. Those children receive no protection at all. Nor do children whose parents use filters but who gain access to the Internet on unfiltered computers. The court of appeals dismissed these serious difficulties by positing that parents who do not use filters "trust their children." Pet. App. 44a. That supposition is no substitute for the analysis this Court called for on remand. This Court should again grant review to correct the court of appeals' misconceptions and should consider the First Amendment implications of this important statute with the benefit of a full, more current record about the evolving technology.

A. This Court Should Resolve The Question Of COPA's Constitutionality, With Due Regard To The Evidence That Promoting Filters Is Not An Equally Effective Alternative

1. This Court's last opinion, rendered at the preliminary-injunction stage and under an abuse-of-discretion standard, did not resolve how the relative effectiveness of

COPA and filters should be analyzed once a full record was developed at trial. Indeed, it would have been impossible for this Court to resolve that question in advance, as respondents suggest it did (Br. in Opp. 10), without an up-to-date record about "the deficiencies of filters," the degree to which parents install filters, and the relationship between the two. See *Ashcroft* v. *ACLU*, 542 U.S. 656, 668 (2004); Pet. 28. The government has now shown that filters are imperfect; that their defects keep them from being universally accepted; and that a substantial share of home computers leave children unprotected.

Yet on remand, neither the district court nor the court of appeals gave sufficient attention to these key points, especially the undisputed facts that nearly *half* of all parents do not use filters and that filters' consistent tendency to block even legitimate sites is a contributing factor in parents' decision to deactivate them. See Pet. App. 90a (district court makes no findings about filter use and almost none about overblocking, opining only that "underblocking is the more important concern"); *id.* at 44a (court of appeals dismisses fact that 46% of parents do not use filters).[1] Nor did the courts below attach significance to the finding that one increasingly common tool for children to browse the Web—the mobile phone—does not currently offer a full

[1] The district court did enter a single finding quibbling with some of the overblocking rates found by the government's expert in his study of filter technology. Pet. App. 95a-96a. Respondents contend (at 12 n.3) that this finding made the government's overblocking evidence "unreliable." But in fact the district court quarreled with only the expert's findings about the America Online (AOL) filter. The expert's findings about 12 other filter products and configurations remain unrebutted, and he found overblocking rates as high as 19.6% even on settings designed to filter only pornography. C.A. App. 773, 796. The AOL filter has no such pornography-only setting, see Pet. App. 96a, and accordingly parents would have the same problem that the expert did.

range of filter technology. *Id.* at 86a. Instead, the court of appeals noted only that filter use had increased 65% over the previous four years. *Id.* at 44a. But that increase still left nearly half of all computers in homes with children unprotected. And the court of appeals did not address whether the rate of use can be expected to increase to the point of making filters an effective alternative. The evidence, which the court overlooked, shows that it cannot. See Pet. 28-29.

2. Respondents contend that this Court settled the applicable law and left only the facts for development on remand. But the points of law to which respondents point (Br. in Opp. 7-8) are First Amendment generalities that were not disputed the last time this Court granted review. What *was* disputed then, and remains disputed today, is how those principles apply to the concededly severe problem recognized by Congress: access by children to harmful pornography on the Web. That issue is now presented on a full record. The court of appeals' attempt to apply the relevant First Amendment principles to that record was deeply flawed and warrants this Court's review.

This Court noted in its previous opinion that Congress may take steps to promote filters. *Ashcroft* v. *ACLU*, 542 U.S. at 669. And the Court stated that the government had not yet proved that this less restrictive alternative would be less effective. *Id.* at 670. The government proceeded to shoulder that burden on remand, introducing evidence that approximately half of all parents do not use filters and that government promotion of filters would have only a limited effect. Pet. 28. The government showed, therefore, that even promoting filters would not address the significant problem COPA targets: millions of children with unfiltered access to harmful pornographic content on the Web. Respondents' suggestion (at 10) that "[t]he government made

no attempt to meet that burden" is simply incorrect. Rather, it was *the courts below* that gave little or no attention to the rate of filter use and the prospects for increasing that rate. The court of appeals simply hypothesized reasons why more parents do not use filters, relying not on pertinent factual findings (there were none) but on evidence submitted by respondents and controverted by the government. See Pet. App. 44a; Pet. 28-29. The invalidation of an important federal statute based on that erroneous analysis warrants this Court's review.

B. Respondents' Position Threatens Effectively To Foreclose Protection Of Children From Pornography On The Web, Despite This Court's Repeated Indications That Appropriate Regulation Is Possible

1. Congress enacted COPA in response to *Reno* v. *ACLU*, 521 U.S. 844 (1997), in which this Court invalidated an Internet-regulation statute because, *inter alia*, Congress should have chosen a less restrictive "possible alternative[]," like "regulating some portions of the Internet—such as commercial Web sites—differently." *Id.* at 879. That is what COPA does. See 47 U.S.C. 231(a)(1), (e)(1) and (e)(2). But respondents now effectively contend that there can be *no* permissible regulation of sexually explicit content on commercial Web sites that is harmful to children. Respondents give two reasons; neither is persuasive.

First, respondents essentially argue that so long as minors can obtain access to pornographic Web sites that are maintained in other countries, COPA's efforts to shield minors from such content in *this* country will be for naught, and therefore "does nothing to advance the government's asserted interest." Br. in Opp. 13. Second, respondents contend (at 11-12) that COPA is *per se* ineffective because of the exclusions for noncommercial speech and for

Internet protocols other than the Web— limitations that Congress wrote into COPA precisely to comply with this Court's decision in *Reno*. Pet. 5, 6.[2]

Respondents' bleak themes of surrender and futility—both their contention that the present inaction of other countries has rendered the United States helpless to address its own serious problems, and their contention that Congress's good faith efforts to comply with this Court's decision in *Reno* are, of necessity, self-defeating—provide no basis for denying certiorari, much less invalidating Congress's effort to address a critical national concern. The First Amendment does not require Congress simply to throw up its hands in the face of the still-present, still-compelling governmental interest in affording children in the United States adequate protection from the concededly harmful effects of pornography on the Web. And even the courts below did not adopt these absolutist positions. See Pet. App. 23a-26a (declining to adopt argument that not including foreign sites would make COPA underinclusive); *id.* at 135a-136a (rejecting argument that covering only the Web is underinclusive). Moreover, this was so even though they misread this Court's 2004 opinion to establish conclusively that COPA cannot be enforced against foreign Web sites at all. Pet. 29-30; see also pp. 10-11, *infra* (discussing the geographic scope of enforcement).

At the preliminary-injunction stage, this Court was well aware that COPA likely would not prevent access to at least some foreign content (though that content might be blocked

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[2] Yet respondents contend at the same time that COPA's limitation to sites operated for "commercial purposes" narrows COPA only "slightly." Br. in Opp. 16.

by filters,[3] where they are used) and that COPA does not apply to non-Web protocols. See *Ashcroft* v. *ACLU*, 542 U.S. at 667-668. Indeed, the district court and the court of appeals had endorsed a theory of underinclusiveness like the one respondents advance here. Pet. App. 188a. Had this Court agreed, it could have declared the case over. Cf., *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001) (invalidating statute on First Amendment grounds at preliminary-injunction stage). Instead, it declined to adopt any of the court of appeals' reasoning, noted that the evidentiary record was silent on relevant aspects of the filter-software alternative, and remanded for a trial principally on the relative efficacy of enforcing COPA and promoting filters. This Court presumably would not have remanded for a pointless exercise; the natural conclusions are that it understood that both filters and COPA are imperfect solutions, and that it remanded to allow the government to establish that COPA satisfied constitutional standards.

2. Respondents, joined in this respect by the court of appeals (Pet. App. 44a), also contend that if a parent does not prevent her child from gaining access to harmful online content, the government has no further interest in protecting that child. Br. in Opp. 13. Once again, respondents effectively contend that no regulation of pornography on the Web is possible and that the protection of children from commercial online pornography must depend on voluntary undertakings. And once again, the First Amendment does not leave Congress so helpless to protect children (and to assist parents in protecting their children) from concededly harmful material.

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[3] Because filters often rely on key words and contextual clues, see Pet. App. 80a-82a, the software would often have trouble blocking sites whose text is in a foreign language.

There is no question here of "overriding the decisions of parents," as respondents suggest. Br. in Opp. 13. Under COPA, parents can permit their children to have access to any site they wish—for instance, by allowing them to use one of the access credentials permitted by the statute, such as a credit card. Pet. 6 n.1; see Pet. 24-25 (discussing the operation of COPA's affirmative defense). Without COPA, however, many children would remain unprotected, even though their parents do not want them to view pornographic Web sites, because their parents would fail (for whatever reason) to install filters on the family computer. And even though some parents do install filters, that does nothing to address the possibility that their children will access the Internet somewhere else, "hack" the filter software, or simply bypass the filter by stealing their parents' passwords. Pet. 29. Thus, even if filters worked perfectly and did not cause parents to remove them out of frustration with overblocking, see pp. 3-4, *supra*,[4] they would not be universally adopted, and they would not be foolproof. COPA works in these situations where filters do not, and in most such cases COPA will be effectuating, not overriding, parents' wishes to keep their children's Web browsing safe.

3. In each of these respects, respondents contend that no matter how well or how poorly filters work, and no matter how widely or how narrowly filters are actually used, filters are better than COPA because they are voluntary, catch foreign material, and regulate some non-Web protocols. That reasoning, if accepted, would mean that despite

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[4] Respondents suggest that parents do not use filters because they trust their children, but they cite a survey of parents who have *never* used filters. See Br. in Opp. 13. Parents who have *removed* filters—a highly relevant subsample—were surveyed separately, and report that the principal reason for removing filters is that they are too restrictive. C.A. App. 1568.

Congress's concededly compelling interest in protecting children and the clear import of *Reno* that there are valid means to achieve that interest, Congress *cannot* regulate the Internet beyond encouraging voluntary measures by parents. But if our Constitution compels such a meager and defeatist approach to this critical problem, such a holding should come from this Court, not from a single court of appeals whose nationwide injunction resolves the matter forever.

C. The Court Of Appeals' Misconstruction Of COPA Warrants Review

The court of appeals' holding that COPA is ineffective, overinclusive, overbroad, and vague rested in large part on the court's mistaken interpretation of several of COPA's key elements. Pet. 21-26. Those interpretations came primarily from the preliminary-injunction panel's opinion, which this Court declined to endorse. Respondents suggest (at 19) that those misinterpretations are "irrelevant," because at the earlier stage they "did not prevent this Court from affirming the preliminary injunction" based on uncertainty about the relative effectiveness of COPA and filter promotion. To the contrary, properly understanding COPA's scope is essential to understanding its likely effectiveness.

1. Most significantly, COPA's affirmative defense rebuts respondents' argument that COPA "criminalizes valuable speech" and that "adults will be deprived of constitutionally protected speech." Br. in Opp. 1, 19. That argument depends on the court of appeals' conclusion that the affirmative defense is "effectively unavailable," Pet. App. 29a (quoting *id.* at 127a). If the defense *is* available, then respondents may display as much sexually explicit (but non-obscene) material on the Web as they wish; they need

only use one of various "reasonable measures" to limit children's access to material covered by COPA. 47 U.S.C. 231(c)(1).

Respondents offer no defense at all of the court of appeals' reasoning, which wrongly concluded that because these "reasonable measures" are not perfect their good-faith use would not be honored under COPA. See Pet. 24-25. Respondents say only that the district court "made over 50 specific findings of fact" on this issue, Br. in Opp. 19, but that has nothing to do with the lower courts' legal interpretation of Section 231(c)(1), which the government has consistently challenged and which is reviewed de novo.

2. Respondents also give only a cursory defense of the court of appeals' conclusion that, as a matter of law, this Court's previous opinion establishes that COPA has no application to foreign sites. See Br. in Opp. 11 n.2. As already explained, that conclusion was erroneous. Pet. 29-30. Instead, respondents principally argue that the court of appeals' error does not matter because "practical considerations" would ensure that COPA is not enforced against foreign sites. Br. in Opp. 11 n.2. That contention is inadequate to defend the court of appeals' incorrect reasoning.

In fact, as the government showed at trial, a significant portion of content that appears "foreign" from its Internet domain name is actually hosted on servers in the United States, and even truly foreign sites operating for commercial purposes contract with American credit cards for payment. Pet. 30; C.A. App. 444-445. These contacts give the United States regulatory leverage that respondents ignore.

And in any event, the government's evidence shows that even reaching only overtly domestic Web sites—which by themselves amount to *half* the world's online pornography—would have a disproportionately salutary effect. An overwhelming majority of "feeder" adult Web sites (which

offer explicit content to induce visitors to pay for more access) are hosted in the United States. C.A. App. 1264.

3. Respondents similarly offer no defense of the court of appeals' holdings on narrow tailoring, vagueness, and overbreadth. They say only that the embedded statutory interpretations (of the terms "commercial purposes," "serious * * * value for minors," and "as a whole") were correct and, in any event, irrelevant. Br. in Opp. 16, 17. But because, as set forth above, the court of appeals' discussion of filters was flawed, it is necessary to reexamine the court's application of these other First Amendment principles as well. The court of appeals deliberately left in place its previous holdings that this important federal statute is unconstitutional. This Court granted certiorari on those issues before, and should do so again. Congress has sought to address an important national problem concerning the welfare of our children in a manner consistent with this Court's precedents. This Court should review the decision invalidating that effort on the full evidentiary record developed below.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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